PRINCIPLES

OF

THE LAW OF NATIONS,

WITH

PRACTICAL NOTES AND SUPPLEMENTARY ESSAYS ON THE

LAW OF BLOCKADE

AND ON CONTRABAND OF WAR.

BY ARCHER POLSON,
OF LINCOLN'S INN, ESQ.

TO WHICH IS ADDED,

DIPLOMACY,

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PREFATORY NOTICE.

THE substance of the following pages was originally published as part of a Treatise on Law contributed to the Encyclopædia Metropolitana by Mr. JEBB, of Lincoln's Inn, Mr. GRAVES, then Professor of Jurisprudence at the University College, London, and myself. It has been thoroughly recast and revised, and extensive additions have been made, so that in many respects it deserves to be considered a new work. Practical notes have been added, as well as two Supplementary Essays on the Law relating to Blockade and Contraband of War, which it is hoped will render it a useful manual for officers in Her Majesty's service, and for persons connected with, or interested in, commercial pursuits. But the original design—that of furnishing a succinct but complete view of the principles of international jurisprudence—has not been lost sight of, and references to works of higher pretension and more detailed information have been given, so that the reader, desirous of prosecuting his inquiries into a subject upon which recent events have conferred peculiar importance, has the means indicated him of satisfying his requirements.

It has been thought desirable to add the excellent article on Diplomacy, which was contributed to the Encyclopædia Metropolitana by the Rev. THOMAS HARTWELL HORNE, an eminent scholar, whose good fortune it has been to have distinguished himself as well by the depth of his learning as by the diversity of his acquirements.

A. P.

LONDON,
TRINITY VACATION, 1848.

THE LAW OF NATIONS.

BY ARCHER POLSON,

OF LINCOLN'S INN, ESQ.

"Si quid novisti rectius istis,
Candidus impertii si non, his utere mecum."

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THE LAW OF NATIONS.

SECTION I.

INTRODUCTION.

I. THE Law of Nations[1] is that law by which the relative rights and duties of nations, whether belligerent or neutral, at war or peace, are defined and enforced.

It is not to be confounded with the Jus Gentium of the Roman civilians, who by that term intended what has been usually understood and discussed as the laws of nature. Quod naturalis ratio inter omnes homines constituit, id apud omnes peræque custoditur, vocaturque jus gentium. (D. i. 1, 9.) The law of *nature*, according to the civilians, embraced the *whole animal kingdom* in its operation; while with us the law of nature is, like the jus gentium, considered as operating upon *mankind* alone.

II. Opinions differ as to the origin and proper character of this system. Hobbes and Puffendorf[2] deny that the distinction between the law is other than verbal, and affirm that "what, speaking of the duty of particular men, we call the law of nature, the same we term the law of nations when we apply it to whole states, nations, and people." Grotius, on the other hand, treats the distinction as real and substantial: "When," he says, "many men of different times and places unanimously affirm the same thing for truth, this ought to be ascribed to a general cause, which in the question whereof we are treating can be no other than

[1] Locke denominates this system "civil law," On Education, § 175, and Dr. Zouch, an eminent English civilian, has suggested the title Jus inter Gentes, or, as we translate it, international law, as the most appropriate; which suggestion, has been adopted by the Cancellor D'Aguesseau, Mr. Bentham, and Dr. Wheaton, the author of one of the latest, and, in most respects, the most useful work on the subject. Doubting, however, with Sir James Mackintosh "whether innovations in the terms of science always repay us by their superior precision for the uncertainty and confusion which the change occasions," it has been thought preferable to retain the name by which this system is best known.

[2] Hobbes, De Cive, ch. XIV. iii. 4; Puff., Law of Nature and Nations, II. iii. 23.

a just inference drawn from the principles of nature or a universal consent. The former shows the law of nature,[3] and the law of nations." "That," he adds, "which cannot be deduced from certain principles by [*2] *just consequence, and yet appears everywhere observed, must owe its origin to a free and arbitrary will." The authority and origin of the law of nations he ascribes to "the will of all, or, at least, many nations;" its proofs, he affirms, to be "the same as those of the unwritten civil law, viz., continual use and the testimony of men skilled in the law."[4] Vattel, perhaps the most popular writer on the subject, seeks to reconcile those discordant opinions. He observes[5] "that the application of a rule cannot be reasonable or just unless it is made in a manner suitable to the subject. We are not to believe that the law of nations is precisely and in every case the same as the law of nature, the subject of them only excepted, so that we have only to substitute nations for individuals. A civil society or State is a subject very different from an individual of the human race, whence, in many cases, there follows, in virtue of the law of nature itself, very different obligations; for the same general rule applied to two subjects cannot produce exactly the same decision when the subjects are different, since a particular rule, which is very just with respect to one subject, may not be applicable to another. There are many cases, then, in which the law of nature does not determine between State and State as it would between man and man. We must therefore know how to accommodate the application of it to different subjects; and it is the art of applying it with a justice founded on right reason that renders the law of nations a distinct science."

III. The position so broadly laid down by Hobbes is based on an assumption altogether at variance with truth, and he states it thus: nations, when once instituted, become endued with the personal properties of individuals, and are, therefore, like individuals, subject to the law of nature.[6] This fashion of considering States as being possessed of the qualities and capacities of individuals, and, consequently, subject to the same general law, is gravely vindicated by Sir James Mackintosh,[7] who observes, that so to consider them is no "fiction of law," but "a bold metaphor," and pregnant with the useful moral, that States, in their dealings with each other, should respect those great principles of justice which avowedly ought to regulate the intercourse of individuals. The metaphor is bold, and *may* carry a moral, but most assuredly metaphors form no safe foundation for reasonings, and, if we may credit history, have, in every age, served only to perplex and obscure the researches of the philosophical inquirer.

IV. Plainly to speak, we may safely affirm that States differ from individuals in every quality in virtue of which individuals are subject to

[3] De J. B. et P., prol. xli.

[4] Omni in re consensio omnium gentium lex naturæ putanda est. Cicero, Tusc. Quæst., I. 13.

[5] Droit des Gens, prol. [6] De Cive, XIV. iii. 2

[7] Discourse, p. 7. Nescio quo modo nihil tam absurde dici potest, quod non dicatur ab aliquo philosophorum. Cicero, De Divin, II. 58.

the natural law. A State is a metaphysical entity, a *mere abstraction, a general term which convenience has dictated to express the political action of a number of individuals united together in a community. Thus where war is declared by the sovereign of one State against the sovereign of another State, it implies that the whole nation, *i. e.*, each individual member of the body which, in its aggregate, constitutes the nation, declares war. "Every man is, in judgment of law, a party to the acts of his own government; and a war between the governments of two nations is a war between all the individuals of which the one and all the individuals of which the other nation is composed." 1 Kent, Comm. 55. [*3]

A State has no conscience, no capacity of suffering, no moral attributes whatever. The members of a State (that is, those whose union constitutes the State) are, in their capacity of individuals, of course, subject to the natural law. From the operation of this law their quality of citizenship, which subjects them also to the authority of a municipal law, exempts them in no degree; and this natural law regulates their conduct in all possible conditions and relations of life, as sovereigns and as subjects, and in their dealings with the sovereign and with the subjects of their own or any foreign State. The authority of the law of nature is in fact, co-extensive with mankind, and has cognizance of all its transactions.

V. The law of nations is, however, very distinct in its character; its rules are not the same, its sanctions are wholly unlike, its obligation is limited. As is every system of law, it is of course *based* in the main on the principles of the law of nature; but these it largely modifies and enforces with his own peculiar sanctions. Indeed, writing not of ethics but of law, of *what is* and not *what ought to be*, it must be acknowledged that, so far from the law of nations being identical with the law of nature, the former confessedly permits, regulates, sanctions, and approves of transactions wholly repugnant to the sovereign and fundamental principles of the latter. An instance of this will at once suggest itself to the mind of the reader familiar in any degree with the history of modern diplomacy. In a judgment of the Supreme Court of the United States of America, the slave trade is admitted to be "contrary to the law of nature." Still in this trade, for a long series of years, the principal and most enlightened nations of Europe have been engaged; the trade then was sanctioned by their usage, and, with such a sanction, could not be pronounced contrary to international law. The fact that some of these nations have lately forbidden the pursuit of this traffic to their subjects, and have entered into treaties with one another for the abolition of the commerce, would not operate so as to render it unlawful as far as the subjects of other States were concerned. The municipal regulations of no State can operate *upon foreigners beyond its frontiers, nor can the special arrangements of any two or more States limit the independent rights of the others.[8] [*4]

The language of Sir William Scott, in reference to the same subject,

[8] The Antelope, 10 Wheat. Rep. 67.

is similar.[9] This great Judge has well expounded the relations which subsist between the two systems, the law of nations and the law of nature. "A great part of the law of nations," he says, "stands on the usage and practice of nations, and on no other foundation; it is *introduced*, indeed, by general principles, but it travels with these principles only to a certain extent, and, if it stop there, you are not at liberty to go further, and to say that more general speculations would bear you out in a further progress. Thus, for instance, on mere general principles, it is lawful to destroy your enemy, and mere general principles would make no great difference as to the manner in which this was effected; but the conventional law of mankind, which is evidenced in their practice, does make a distinction, and allows some and prohibits other modes of destruction, and a belligerent is bound to confine himself to those modes which the common practice of mankind has employed."[10]

VI. The law of nations originates in the will of nations; its authority is their consent, and its evidence is their practice and conventions. Practice evidences what is called the *customary* law of nations, and conventions the *conventional* law of nations.

(i.) The larger proportion of the law of nations owes its origin to the practice and usages of nations. The obvious convenience of certain rules has obtained for them, in the intercourse of civilized communities, an acceptance and consequent authority inferior in no degree to that which attaches to the results of express compact and solemn convention. Some of these rules are partial in their operation, because the usages which have originated and evidence them are only local in their nature, *e. g.*, the customary law relating to the whale fishery.[11]

It is competent to any nation, that so pleases it, to renounce any of her customs, and so to exempt herself from the jurisdiction of such portions of the law of nations as those customs warrant;[12] but she cannot by any municipal regulation of her own add to that law (Pollard v. Bell, 8 T. R., 434), any more than can any congress, however eminent the persons that compose it (Le Louis ut cit.), nor can she, whilst subject to the law, privilege herself to the commission of any act that that law treats as a crime.

(ii.) The conventional law of nations is comprised in the treaties to which, at different times, the various independent powers have become [*5] *parties. Some of these are even considered to have an operation beyond the parties contracting. The circumstance that they have been for the most part constructed in reference to the same principles and by diplomatists educated in the same school of public law, and referring as authorities to the same writers, has given them a certain value in the resolution of vexed questions, and in the exposition of what the law actually is upon any point which may have been doubted.[13]

[9] The Le Louis, 2 Dods. 238.

[10] The Flad Oyen, 1 Rob. 140. [11] Fennings v. L. Grenville, 1 Taunt. 248.

[12] In such case a timely notice of her intention should be given. Ib. Martens, Précis, II. ii. 3.

[13] 1 Wheaton, Elements, 60, 61; Martens, Précis, Introd. 3 II. ii. 5; Klüber, Droit des Gens Moderne de l' Europe, tit. prel. I. 84. There is an instance of treaties

VII. Before dismissing the subject, it is desirable to repeat that the law of nations is conversant simply with the *mutual* relations subsisting between independent States, and that, therefore, when Vattel, in his celebrated treatise (I. vi. xi. xiv.,) wrote "Of nations considered in reference to themselves," described the political constitutions of various political communities, and discussed "the objects of a good government," he occupied himself with matters with which the law of nations has no proper concern. It has also been the error of some writers upon the subject that they have understood the legislation by which various States have regulated themselves in their intercourse with foreign countries as belonging to the corpus of international law, whereas such legislation has no authority or virtue beyond the confines of the State in which it originates, or the jurisdiction such State is able to exercise. It belongs to the public law of the State, but is exclusively municipal in its character, and essentially distinct from that system of jurisprudence to whose obligations the civilized countries of the world have equally subjected themselves.

VIII. It may here be useful, though perhaps something invidious, to remark that a want of precision in language exposes Dr. Wheaton, an eminent publicist and writer of repute, to criticism of a similar kind. He gives the name "absolute *international rights*" (i. 107) to those rights which every state enjoys in virtue of its existence as a State, which are involved in the very terms of its being, and are inherent in it from the actual necessity of the thing. Such rights are the rights of the State to its security, independence, equality and property; rights antecedent in their origin to international law, which, if it defines and enforces them, limits their exercise and modifies their character. Such, without an abuse of language, cannot be designated "international rights."[14]

IX. There is another circumstance to which jurists do not appear to have sufficiently attended, and their neglect of which has, in many instances, deprived their speculations of that practical value which otherwise would have belonged to them. This neglect also appears to have resulted from an imperfect appreciation of the true character and scope of the law of nations, due, however, to the indisputable [*6] fact, that this system of jurisprudence in so many points approximates to the science of general politics, that it is often difficult to ascertain its appropriate boundaries and legitimate domain. By the science of general politics—a term tolerably intelligible, though assuredly not very precise or determinate—must be understood as meant the science of civil prudence, or, as Lord Bacon styles it, civil knowledge; and which belongs to the province of ethics rather than of law. This science, being "conversant about a subject which of all others is most immersed in matter and hardliest reduced to axiom,"[15] is beset with so many difficulties of its own, that to confound it with the law of nations is only to perplex

being taken as declaratory and expository in Emerigon, Traite des Assurances, but I am unable to verify my reference to the passage.

[14] M. Klüber (Droit des Gens, i. 65) styles them Droits absolus des Etats, a designation not less objectionable.

[15] Advancement of Learning, p. 272; edit. 1633.

and impede the resolution of questions properly distinct in their character, and in themselves sufficiently complicated and embarrassing. States, it must be remembered, may not always enforce their just claims[16] —privileges may be waived—positive injustice may be endured; at times, things lawful may not be thought convenient; at others, things unlawful may be successfully accomplished; and on all occasions we cannot safely argue from the fact to the right, and conclude from what is done, what ought to have been done. With examples illustrative of this, the diplomatic History of Europe abounds, and there is nothing the jurist ought more sedulously avoid than ascribing a scientific value to that which is the result only of prudent policy—a policy having regard less to positive rights than to times and occasions.

[*7] *SECTION II.

HISTORY OF THE LAW OF NATIONS.

I. The Law of Nations is the natural result of a state of comparative civilization, in which the benefits of commerce and international intercourse are known and appreciated. By the Greeks, every foreigner was esteemed a barbarian, and barbarian and enemy were synonymous terms. Without an express compact, men, in their belief, owed no duties to each other; and we may reasonably refer the indignation expressed by the Ithacans against Eupeithes, for having joined the plundering Taphians against the Thesprotians, to the fact of a league subsisting between themselves and the latter nation. There is much force in the expression—

οἱ δ' ἡμῖν ἄοθμιοι ἦσαν.[1]

II. The sense of a common insecurity appears early to have induced many of the Greek cities to form leagues or confederacies amongst themselves for the purpose of mutual defence, but in, perhaps, every instance, religious considerations largely influenced the formation and character of such combinations. Of these unions and the effects which they produced in developing the elements of a public law in Greece, our information is imperfect, and respecting the object and results of the most celebrated of

[16] Martens, Précis, II. iii. l. As an instance of this we may refer to the reply of the British Government (25 Sept. 1807) to the Russian declaration of war in 1807. This latter power insisted on the proceedings of the British fleet in entering the Sound and attacking the Danish capital, in disregard of the inviolability of the Baltic. In answer, the principles on which the inviolability of that sea had been rested were denied, although it was admitted that our Government had at particular periods, for special reasons, forborne to act in contradiction to them. Papers laid before Parliament, January, 1808. On such doubtful questions, see some observations by Dr. Wheaton, 1 Elem. 96, 97.

[1] Odyss. XVI. 428.

their number—the Amphictyonic confederation—scholars are divided in opinion.[2] The oath of the Amphictyons, which has been preserved by Æschines, (De F. L., 121,) was in these terms, "That they would not destroy any city of the Amphictyons, nor, in war or peace, cut of their water, and, if any should do so, they would march against him, and destroy his cities; and should any pillage the property of the god (Apollo,) or be privy to or plan anything against what was in his temple (at Delphi,) they would take vengeance on him with hand and foot and voice and all their strength." The security of the temple of Delphi was probably the chief object of this association, (Grote, Hist. Greece, ii. 311–32,) and there is no intimation that it had properly any external operation, except for this purpose. From its history, we learn that, although it affected a national character, its interference in *the affairs of Greece was only occasional, and rarely effective (conf. Grote ut cit.; Thirl- [*8] wall, Hist., i. 435–9; Muller's Dorians, II. iii. 5).[3] The public law to which it gave rise may, according to M. Sainte Croix, be reduced to the following principles:—i. those who perish in battle were to be buried; ii. no permanent trophy was to be raised in commemoration of a victory; iii. the lives of such as take refuge in the temples of a captured city were to be spared; iv. burial was to be denied to the sacrilegious criminal; v. no molestation was to be offered to the Greek resorting to the public games and temples, and there sacrificing. It was, however, a party to the most cruel and oppressive acts when the interest of its favorite Delphians were in question. Witness its conduct in the first Sacred War, when, at its instigation, the Athenians, by an artifice of Solon, succeeded in poisoning the Crisseans, and levelling their city with the ground.[4]

III. The Romans appear to have made but little advances towards recognising an international law, although of such a system Cicero conceived the necessity, and advocated the adoption, whilst his great rival, Sallust, did not hesitate to denounce a Numidian massacre, by Marius, as contra jus belli. These facts, with the circumstance that the Romans established a college of heralds, and instituted a Fetial Law, have led writers to infer that amongst this people subsisted just such notions of the relative duties of States; but an examination of their history will show the supposition to be erroneous. Some formalities[5] were certainly adopted in the declaration of hostilities, unknown as it would appear to the Greeks; the relation to allies was recognised in principle, however neglected in practice, but the moderation towards the vanquished, certain fruits of international law,

[2] M. Sainte Croix, an Hellenist of no mean repute, considers it to have been simply a religious institution (Gouvernemens Federatifs, p. 39,) but his conclusion is disputed by M. W. F. Tittmann, who ascribes to it a high political importance. Uber der Bund der Amphiktyonen, pp. 200-37. Berl. 1812. It is strange that Dr. Wheaton, writing from Berlin, should not, in his Histoire du Droit des Gens en Europe (Leipzig, 1841,) have adverted to this last-named work, upon which the Berlin Academy had bestowed the highest eulogiums.

[3] The Achæan Confederation was a league of another kind. It resembled in its constitution the United States of America, judging from the scanty notices we receive of it in the pages of the accurate and conscientious Polybius, ii. 37, ed. Bekker.

[4] Æschines adv. Ctesiphon, 125; Pausanias, X. 37, 84.

[5] Cicero, De Respublicâ, II. 17.

ascribed by the patriotism of Seneca and Tacitus to the founder of Rome, was, in fact, no more than the policy of an infant State, anxious to increase its strength by the incorporation of conquered enemies, and was found noways incompatible with the Roman victor dragging at the chariot wheels of his triumph the kings and senates whose captivity be had purchased with his sword. With the Fetial Law we are only imperfectly acquainted, but it seems to have been simply a law peculiar to the Romans, and regulating their conduct towards foreigners, and not properly an international law common to other nations, and determining on general principles their respective rights and duties.

IV. If the middle ages were distinguished by a large appreciation of the rights of nations, and an approach to the true principles of a law [*9] of nations, it is owing chiefly to the diffusion of *Christianity through Europe. According to Barrington,[6] merchant strangers were, by the laws of the Wisigoths, not only protected, but permitted to enjoy the benefit of their own laws. In Sicily, the plunder of shipwrecked goods was made a capital offence; whilst the Bavarians assured safety and immunity to all foreigners entering their territories. Our Magna Charta also (cap. xxx.) extended protection and offered encouragement to merchant strangers. The extension of commerce[7] and the rise of a spirit

[6] Observations on Statutes, chiefly the more ancient, p. 22; Dublin edit.

[7] Some notice must be taken of the maritime codes which contributed greatly to develop the elements of international law in Europe. The Rhodians—a people to the extent of whose commerce and power Cicero, who studied amongst them, bears testimony (Orat. pro. Leg. Manil. xviii.)—possessed a code of this kind, which was recognised at Athens, in all the islands of the Ægean, and throughout the coasts of the Mediterranean. (Pardessus, Coll. des Lois Mar., i. 231.) The Roman emperors adopted this code, or what was understood as such, into their jurisprudence, and probably it was not without its influence on the legislation of those cities which, after the fall of the Roman empire, prosecuted commercial intercourse with the islands and shores of the Mediterranean. Amongst these, Amalfi, that, early in the middle ages, traded with the ports of the eastern empire and the capital of the caliphs, was prominent, but it was the compilation of the famous Consolato del Mare, to which we must refer the origin of our modern maritime jurisprudence. A variety of opinions subsists in relation to this singular monument of mediæval sagacity, which cannot be discussed here. Azuni, on the bare assertion of Constantino Gaétan (a writer of the eighteenth century,) believes it to have been compiled in Pisa, and to that opinion, though resting on so slender a foundation, Mr. Hallam (Midd. Ages, iii. 396-8) has given the sanction of his approval. More probably, its language being a dialect of the Romanz, prevailing with but little alterations among the Catalans at the present day, its origin was Catalan. At Barcelona, the first known edition was printed, and there the earliest MS. is presumed to have been written. Its date is fixed by M. Pardessus between 1300 and 1400. Its compilers appear to have been largely indebted to a collection of maritime precedents and decisions, popularly known as the Laws of Oleron (des Rooles de Oleron,) and vulgarly supposed to have been framed by Richard I., our lion-hearted king, but the primitive portions of which cannot have been reduced to writing later than the eleventh century. They were first published by Garcie de Ferrande, in 1541, under the title Grand Routier de la Mer. See Pardessus, i. 828. Another maritime code (to be found in M. Pardessus's great work, and in Postlethwaythe's Dict. Commerce, ii.) was the laws of Wisby, (Hogeste Water-Recht tho Wisby,) the capital of Gothland, the great mart of the Baltic, and the resort of traders from every part of Europe, and even from Asia. They were compiled in the twelfth century out of the Rôles d' Oleron, and the maritime customs of the Low Countries. Respecting these, and also the early commercial legislation of the Hanseatic League, reference should be had to Pardessus and Dr. Lappenberg's

of community in Europe, to which the Crusades and the system of chivalry gave birth, originated by degrees the rudiments of an European public law and treatise, formal declarations of war, and a more general recognition of the rights of ambassadors, were all so many evidences of the progress of civilization. This general public law, or law of nations, to the development of which contributed, *in a great degree, the [*10] study of the Roman jurisprudence, was considered as operating only upon Christian nations; and the Pagan and his possessions were still considered the lawful prey of the Christian conqueror. The Roman church to whom this perversion of Christian doctrine is fairly attributable, was, however, an important agent in the establishment of a law of nations in Europe; and this, not simply by the impetus which it communicated to European civilization, but also by constituting a species of European political system of which it became the head. It is difficult to overrate the importance of such a central power which, being independent and antiphysical, and owing its existence wholly to moral influences, was able and disposed to become the arbiter of national differences.

V. The perfection of the law of nations has been owing chiefly to two causes: First to the formation of the political system of modern Europe; and, secondly, to the writings of Grotius and other eminent publicists.

(i.) The political system of modern Europe, originating in the relations that have arisen amongst European States, is referred by Heeren[8] generally to the progress of civilization, which necessarily multiplies the points of contact between neighboring States, and specially to four causes: (1) the Italian wars; (2) the affairs of religion after the Reformation; (3) the necessity of opposing the Turks; (4) the commerce of the colonies, and the commercial interests resulting therefrom. To which he properly adds, (5) the facility of communication which printing and the establishment of posts afford. Another bond of union amongst European nations was the similarity of their laws and habits arising from their common origin. It may finally be observed that, as the power of the Roman church declined, the Germanic empire became the centre of the European system, to the solidity and compactness of which it greatly contributed. This end was secured, moreover, by the circumstance that monarchy was the prevailing form of government in Europe, and the direction of public affairs being intrusted to the hands of a few, greater steadiness of international policy was secured than has yet been found compatible with the character of democratic institutions.

(ii.) The second cause of the perfection of the law of nations is owing to the writers on the subject. A brief notice of some of these will be found useful.

VI. Francisco a Victoria, a Salamanca professor, who commenced teaching at Valladolid in 1525 (reported the restorer of theological learning in Spain,) discusses, in his Relectiones Theologicæ (Lyons, 1557), the

learned work Urkundliche Geschichte der deutschen Hanse. The edition by the latter of Sartorius, Urkundliche Geschichte des Ursprunges der deutschen Hanse (Hamb. 1830) may also be consulted with advantage.

[8] Manual Hist. Pol. System of Europe, i. 7.

general right of war; the difference between public war and reprisals; [*11] the just and unjust causes of *war; its proper ends, and the right of subjects to examine its grounds. He bases the rights of the King of Spain over the American Indians on the ground (inter alia) that the Indians had denied permission to trade in their country, which he esteems a just cause of war, but denies that the war was just simply because the Indians were Pagans.

VII. The next writer on this branch of jurisprudence claiming remark is a pupil of Victoria, Dominic Soto, a Spanish Dominican, distinguished for the active part he took in the Council of Trent against both the Papal and Scotist factions. He was consulted by the Emperor Charles V., to whom he was confessor, on occasion of a conference held before him at Valladolid, in 1542, at which Sepulveda appeared as the champion for the Spanish colonists and Las Casas as an advocate for the oppressed American Indians. The opinion of Soto was conformable to that of his great master,—"*Neque discrepantia (ut reor) est inter Christianos et infideles, quoniam jus gentium cunctis gentibus æquale est.*" His celebrated work, De Justitia et Jure, from which this passage is taken, was published in 1568. Soto condemned in strenuous language the atrocities of the slave trade.

VIII. Probably the earliest work in which the practice of nations in time of war is to be found fully discussed is one by Balthazer Ayala, judge advocate (if we may use the term) to the Spanish army in the Netherlands, under the command of the Prince of Parma. It is entitled De Jure et Officiis Bellicis et Disciplinâ Militari, Libri III.; was published about 1582; and was highly commended by Grotius. Like Victoria and Soto, the author denies the lawfulness of levying war against infidels even by the authority of the Pope, on account of their religion, for their infidelity does not, he observes, deprive them of the right of dominion, inasmuch as the sovereignty of the earth was given to every reasonable creature. "*Et hæc sententia,*" he adds "*plerisque probatur, ut ostendit Covarruvias.*"

IX. Albericus Gentilis, the next international jurist of note, was an Italian protestant, who, through the Earl of Leicester, obtained the professorship of civil law at Oxford. His work De Legationibus was first published in 1583; and another by him, De Jure Belli (Lyons, 1589), was imitated in its plan by Grotius in the first and third books of his great work.

X. We may also mention the name of the renowned jesuit, Francisco Suarez, the casuist, styled by Grotius[9] the most acute of philosophers and divines, who flourished in the latter part of the sixteenth century, and who by his treatise De Legibus ac Deo Legislatore, proves that he was the first to see, according to Sir James Mackintosh, "that international law was composed not *only of the simple principles of [*12] justice applied to the simple intercourse between states, but of those usages long observed in that intercourse by the European race

[9] Grot. Epist. cit. Anton. Bib. Hisp. Nov. i. 482. Mad. 1782.

which has since been more exactly distinguished as the consuetudinary law acknowledged by the Christian nations of Europe and America."[10]

XI. It was, however, from Hugo Grotius that the law of nations received its development, not only as a positive system but as a dogmatic science, and to him may we refer distinctly the vast superiority in regard of humanity of the modern over the ancient usages of warfare. His mild, tolerant, and benevolent spirit is conspicuous in every part of his writings, and even when his positions are most open to dispute, his spirit of moderation and candor never fail to manifest themselves. His great work, De Jure Belli ac Pacis, the composition of which, according to Puffendorf (§ 2,) was suggested by a study of Lord Bacon's writings, was composed in exile, and first appeared in Paris, dedicated to Louis XIII., in 1625. Gustavus Adolphus, in the war he undertook to secure the liberties of Protestant Europe, always slept with a copy of it under his pillow. Never did a single work accomplish larger political results, although petulent criticism has charged upon it, as an error, that it abounds too much with citations, which serve rather to display the author's learning than to evidence his judgment. From this charge Grotius has been well defended by a kindred spirit. "He was not," says Sir James Mackintosh, "of such a stupid and servile cast of mind as to quote the opinions of poets or orators, of historians or philosophers, as those of judges from whose decisions there was no appeal. He quotes them, as he himself tells, as witnesses, whose conspiring testimony mightily strengthened and confirmed by their discordance on almost every other subject, is a conclusive proof of the unanimity of the whole human race on the great rules of duty and the fundamental principles of morals."—Disc. p. 24.

His successor was Samuel Puffendorf, who (born 1681) was chosen by Karl Ludwig, the Elector Palatine, to fill the chair of Law of Nature and Nations at Heidelberg, the first chair of the kind instituted in Europe. His De Jure Naturæ et Gentium appeared in 1672, and is a highly valuable work, although the author was styled, by Leibnitz, Vir parum jurisconsultus et minime philosophus.

XII. Subsequently to this time have flourished the translator and editor of Grotius, Puffendorf and Bynkershoek, Jean Barbeyrac, who translated Grotius into French, with notes, in the year 1724, Puffendorf (the best edition of which is that of London, 1740,) and Bynkershoek—all with valuable notes. Christian de Wolf (1679) was professor at Halle, 1707, at Marbourg, 1723 to *1754, and his Jus Gentium [*13] was published at Halle in 1749. Bynkershoek, a dutch jurist, is a useful and learned writer of authority. His De Dominio Maris was published in 1702; his De Foro Legatorum in 1721, and his principal work Questiones Juris Publici, has been translated into French by Barbeyrac, (Hague, 1724,) and into English by Dr. Du Ponceau, provost of the law academy of Philadelphia. Both of these editors have added useful notes. A considerable portion of Bynkershoek's Quæstiones Juris Publica was translated into English, and published in 1759, intituled "A Treatise on Captures in War. By Richard Lee, Esq." A second

[10] Dissertation on the Progress of Ethical Philosophy, Whewell's edit., p. 110.

edition was published in 1803, with some additional notes by the Editor (the Rev Thomas Hartwell Horne.) Professor Van Martens is a distinguished jurist; and we may fairly add the name of a recent writer, Dr. Henry Wheaton, long a reporter of the Supreme Court of the United States of America, and subsequently resident Minister at the Court of Berlin.

XIII. It would not be difficult very considerably to increase the list and enumerate many useful treatises on the law of nations that have recently appeared, especially in France and Germany—most of them discovering much learning, and not a few of them distinguished by the originality of their views and the excellence of their method. But at present, none of these can pretend to anything like authority; for the international, like the municipal, jurist has respect for nothing but antiquity; so that the living writer must content himself with a sarcastic reflection from which the Roman satirist professed to derive a sort of consolation:

> "Sic fautor veterum, ut tabulas peccare vetantes,
> Quas bis quinque viri sanxerunt, fœdera regum
> Vel Gabiis vel cum rigidis œquata Sabinis,
> Pontificum libros, annosa volumina vatum,
> Dictitet Albano Musas in monte locutas."
>
> HOR. Epist. II., i. 23.

[*14]

*SECTION III.

SOURCES OF THE LAW OF NATIONS.

I. The law of Nations, according to Sir William Scott, is "fixed and evidenced by general, ancient, and admitted practice, by treaties, and by the general tenor of the laws, ordinances, and formal transactions of civilized States."[1] It does not enjoy the advantage possessed by every system of municipal jurisprudence, of being expounded and enforced by an independent and impartial judiciary; and if in some points it should be deficient in that precision and certainty which, taught by one of his great oracles, the English lawyer is prone to esteem the highest perfection of every jurisprudential system,[2] it is chiefly owing to this fact. The sources of the law of nations may be enumerated as follows:—

II. (i.) Text-writers of authority; an authority which they obtain whenever they record the usages and practice of nations, and whenever their speculations are conceived in a spirit of impartiality. This is a character which especially belongs to the great work of Grotius, and is consistent with the disposition of one whose candor and love of justice so far subdued his personal feelings as to enable him rightly to appreciate the character of his inveterate persecutor.[3] The writings of Puffendorf and

[1] The Le Louis, 2 Dods. 249. See also Lord Mansfield's observations in Triquet v. Bath, W. Bl. 471.

[2] "Certainty," says Lord Hardwicke, "is the mother of repose, and therefore the law aims at certainty." Water v. Tryon, 1 Dick. 245.

[3] Prince Maurice of Nassau.

the other publicists already mentioned have always been considered as forming a part of the corpus of international law. The degree of authority to which the writings of certain publicists is entitled will always be a subject of controversy. Such, for instance, as that of Selden, who in his work, Mare Clausum (1635,) following in the steps of Alberic Gentilis (Advocatio Hispanica, 1613,) asserts the right of England to the sovereignty of the British seas. But generally it is to the works of eminent jurists that the nations of Europe appeal as authorities in the determination of their mutual differences. Our own country has been distinguished by the deference she has on all occasions paid to these venerable and enlightened expositors of international jurisprudence.[4] In her courts, they *exercise that sort of influence which the writings of Pothier [*15] enjoyed in France before she formally adopted large portions of them into her written laws when she codified her jurisprudence—"Les ouvrages de Pothier n'ont pas été reçu comme lois; mais ils ont obtenu un honeur semblable: car plus de trois quarts du Code Civil ont été littéralement extraits de ses traités." (Dupin, Dissert. sur Vie &c. de Pothier, p. cxiv.) When we speak of them as possessing authority, we employ the term in the sense in which it is used by Livy in his character of Evander—"Evander tum ea auctoritate magis, quam imperio regebat loca," (Liv. I. 7, see R. v. Almon, Wilmot, N. 256, et seq.) "A learned writer," says Harrington, "may have authority though he has no power." (Oceana, Works, p. 39.) It is thus that the decisions of international tribunals, and other tribunals, when dealing with questions of international law, have acquired that *fixity* that enables them to be digested into a system, which would otherwise have been utterly impossible. Happily they have adopted and adhered to the principle "che un opinione di Carpsovio, un uso antico accenato da Claro, un tormento con iraconda compiacenza suggerito da Farinaccio, sieno le leggi a cui con sicurezza ubbidiscono colere che tremando dovebono reggere le vite e le fortune degli uomini." (Beccaria, Dei Delit. e dell. Pene. pref. p. 6, Vienna, 1798.)

(ii.) The adjudications of international tribunals as boards of arbitration and courts of prizes. The degree in which the authority of these adjudications is admitted depends of course in a great measure on the constitution of the tribunals from which they emanate. "Greater weight," says Dr. Wheaton, "is justly attributable to the judgments of the mixed tribunals appointed by the joint consent of the two nations between whom they are to decide, than to those of Admiralty Courts established by and dependent on the instructions of one nation alone."[5]

(iii.) Ordinances of particular States prescribing rules for the conduct of their commissioned cruisers and prize tribunals.

(iv.) The history of all diplomatic transactions.

(v.) Treaties, whether of peace, alliance, or commerce.

[4] See the report made to the King in 1753, in answer to the Prussian memorial prepared by Sir George Lee, Dr. Paul, Sir Dudley Ryder, and Mr. Murray (Lord Mansfield), in the Appendix. Amongst the writers quoted in our courts are Barbeyrac, Vattel, Wicquefort (Viveash v. Becher, 3 M. & S. 284). Bynkershoek, Grotius, and Puffendorf (Wolf. v. Oxholm, 6 M. & S. 92.)

[5] 1 Elem. 57, 58.

[*16] *SECTION IV.

AUTHORITY OF THE LAW OF NATIONS.

I. The subjects of the Law of Nations are what are usually designated sovereign States; that is, States which govern themselves independently of foreign powers. It is not necessary in this place to enter into any lengthened description of the signs and tokens in which this quality of sovereignty manifests itself. The right of negotiation is, as far as the law of nations is concerned, the most important of these; but this is a right which may be modified by compact without the State forfeiting its title to be considered as a sovereign State. Such was the case with the States which formed the late Germanic Confederation, who by the terms of their union, were precluded from negotiating a separate treaty, or even concluding an armistice, without the consent of the Confederation, with any power against whom the Confederation have declared war.[1] On the other hand, in the Swiss Confederation, while the Diet possesses the exclusive right of declaring war and effecting treaties, each canton is authorised to conclude for itself military capitulations and treaties relating to economical matters and matters of police, so long as they do nothing inconsistent with the federal pact and with the rights of the other cantons. By the constitution of the United States of America no State is permitted "to enter into any treaty, alliance, or confederation by itself, keep troops or ships of war in time of peace, enter into any agreement or compact with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will admit of no delay."[2] The President has power, by the consent of the senate, provided two-thirds of the senators present concur, to levy war, make peace, and enter into treaties.[3] The right of negotiation, apart from compact, depends upon the internal organization of the State, and of this, to use an expression familiar to municipal jurisprudence, every other State is bound to take notice.

II. The law of nations, owing its existence to the will of nations its authority is necessarily limited to those nations that have evinced their willingness to be bound by it. To learn what nations have done so we must resort to history for information; but speaking generally, we may say that as a system, it has been adopted by, and therefore binds, all the nations of
[*17] Europe[4] and *their emancipated colonies in the other hemisphere. Formerly it would seem to have been doubted how far the Turkish empire could have been considered within its range;[5] but modern

[1] 1 Wheat. 74. [2] Art. i. § 10. [3] Art. ii. § 2.

[4] The law of nations is adopted in Great Britain in its full and most liberal extent by the common law, and is held to be part of the law of the land; and all statutes relating to foreign affairs should be framed with reference to that rule. 4 Comm. 67; Ricord v. Bettenham, W. Bl., 563; Triquet v. Bath, ut cit.; Hopkins v De Robeck, 3 Durnf. & East, 79; Viveash v. Becker, ut cit.

[5] Martens, Précis, Introd. § 4. It observed, however, according to this writer,

events teach us to consider that power as a member, and no unimportant member, of the European commonwealth, and as clearly subject to the law of nations.

III. As to those nations whose policy forbids our considering them in the same light, we may conclude that they are entitled to the protection of international law no further than what an enlightened appreciation of the natural rights of States will obtain for them. To treat the nations with cruelty—to violate their independence—to oppress their citizens—to despoil their dominions—these are acts so plainly inconsistent with the character of civilized nations—so wholly repugnant to the obvious dictates of natural justice, that the State who indulged in them would draw down on itself the just indignation of Europe; but at the same time these uncivilized States are not entitled to those formal courtesies or privileges which the comity of civilized nations consider as reciprocally due, such as respect the ransom of prisoners of war, the rights of ambassadors, &c. (1 Wheat. 52.) They cannot expect to receive advantages which they deny to others; but, on the other hand, in their intercourse with civilized States, they are not oppressed with the necessity of observing the technical solemnities of a jurisprudence, from a full participation in whose benefits they are sequestered by their barbarism. Thus a formal sentence of condemnation by a Court of Admiralty was not considered requisite to transfer the property in a vessel captured by the Algerines, and subsequently sold *bona fide* to a Christian purchaser. It was held sufficient if the confiscation had taken place by a public act of the competent authority, according to the custom established in that part of the world.[6] This was the distinction between them and more civilized States.

IV. The African States, were not, however, deemed exempt from an observance of the law of blockade, and this for good reasons. "On a point like this," said Sir W. Scott, "the breach of a blockade—one of the most universal and simple operations of war in all ages and *countries, except such as are merely savage—no indulgence can [*18] be shown. It must not be considered by them that if an European army or fleet is blockading a town or port that they are at liberty to trade with that port. If that could be maintained, it would render the obligation of a blockade perfectly nugatory. They, in common with all other nations, must be subject to this first and elementary principle of blockade, —that persons are not to carry into the port supplies of any kind. It is not a new operation of war; it is almost as old and general as war itself. The subjects of the Barbary States could not be ignorant of the general rules applying to a blockaded port so far as concerns the interests and duties of neutrals."[7]

none of the forms of diplomatic etiquette, VII. vi. 1. See also 1 Wheat. 221, and 4 Co. Inst. 155; Klüber, Droit des Gens Mod. de l' Europe, p. 1, ii. 5.

[6] The Helena, 4 Rob. 3. Formerly it was considered that there was no change of property in case of a recapture, so as to bar an original owner in favor of a recaptor or his vendee, until there had been a sentence of condemnation. (Goss v. Withers, 1 Burr. 696; Lindo v. Rodney, 1 Doug. 616; The Flad Oyen, 1 Rob. 139.) See also 13 Geo. II. c. 4, and 29 Geo. II. c. 34.

[7] The Hurtige Hane, 2 Rob. 124.

V. The native princess of India appear also to have been considered as within the operation of the general principles of the law of nations;[8] and, as it would seem by a case decided in the reign of Queen Elizabeth, the Emperor of Morocco also.[9]

VI. In the early periods of European history, the rights of every Christian people to subject savage nations to their dominion, and to dispossess them of their territories, were not only vindicated in theory but asserted in practice. The Popes, who considered themselves as lords paramount of all princes, were accustomed to secure the support and reward the fidelity of their royal subjects, by ample donations of territory "*in partibus infidelium.*" Thus did Alexander VI., in 1493, bestow on Ferdinand and Isabella of Spain the lands not previously occupied by a Christian nation, discovered and to be discovered beyond a line drawn from pole to pole one hundred miles west of the Azores; and thus did Nicholas V. confer the sovereignty of Guinea, and the right of subduing its inhabitants, on Alphonso of Portugal and the Infante Henry. The sovereigns thus favored did not, it would seem, consider it altogether prudent to rest their title to their new acquisitions wholly on these grants. The rights arising from discovery and priority of occupation were frequently alleged by them. The lawfulness of spoiling the idolator is assumed in the patent granted by Henry VII. of England to the celebrated John Cabot (Giovannia Gavotto) and his sons, who are thereby empowered "to seek out and discover all islands, regions, and provinces whatsoever that may belong to heathens and infidels," and "to subdue, occupy, and possess these countries as his vassals and lieutenants." Sir Humphrey Gilbert was authorized by Queen Elizabeth "to discover such remote heathen and barbarous lands, countries, and territories not actually possessed of a Christian prince or people, and to hold, occupy, and enjoy the same, with all their commodities, jurisdictions, and royalties."

[*19] *SECTION V.

PACIFIC RIGHTS OF NATIONS.

The Pacific Rights of Nations are either those which they possess absolutely, by virtue of their existence as nations, or those which result from the relations which arise amongst themselves. Let the first be called their *Natural* Pacific Rights—the second, their *International* Pacific Rights.

§ 1. *Natural Pacific Rights of Nations.*

The natural and inherent rights of States, or nations having a distinc-

[8] Elphinstone v. Bedreechund, 1 Knapp, 316. In the case of the Advocate-General of Bombay v. Amerchund, the authority of both Puffendorf and Bynkershoek were relied on in argument, 1 Knapp. 329. [9] 4 Co. Inst. 152-4.

tive political existence, are their rights to enjoy *security, independence, equality and property.* The law of nations regulates the manner in which, and the conditions subject to which, these rights are to be exercised, and its operation in this respect is now to be considered.

THE RIGHT TO SECURITY.—I. As that political corporation called a State, is presumed to exist for the benefit of those who compose it—*ut cives feliciter degant*—it is its undoubted duty, so to speak, to protect its members against a foreign interference with their lawful pursuits of industry, and in the enjoyment of their acquired property. So, on general principles, it is authorized at its will to levy forces, raise fortresses, and impose taxes to furnish a revenue adequate to supply the means of defence.

II. By convention, this right has often been materially modified, *e. g.*, Genoa, by a treaty with France, (1685,) agreed to diminish its armed navy; while France, by the Treaty of Aix-la-Chapelle (1748) and of Paris (1786,) undertook to dismantle Dunkirk, long the terror of our channel trade, and by the treaty of 1815, to level the fortifications of Huningen which had threatened the city of Basle, covenanting, at the same time, to raise none others within three leagues of that city. These may be thought the hard terms which the power of the conqueror, flushed with the insolence of success, enabled him to impose, but they are to be justified on the ground that they were requisite to the enforcement of that very principle—the right to security—which they appeared at first sight to contravene.

III. It was long a moot question amongst jurists how far an interference is justified when a State already powerful is increasing her power to such an extent as to become an object of terror to her neighbors.[1] It is the unquestionable right of every State *to multiply its re- [*20] sources, as well by internal improvement as by external aggrandizement, provided it does not violate the rights of other States. "Nevertheless," says Professor Martens, "it may so happen that the aggrandizement of a State already powerful, and the preponderance arising from it, may sooner or later endanger the safety and liberty of the neighboring States. In such case there arises a collision of rights, which authorizes the latter to oppose by alliances, and even by force of arms, so dangerous an aggrandizement, without the least regard to its lawfulness."[2] Grotius, on the other hand, denies that "The dread of our neighbor's increasing strength is a warrantable ground for our taking up arms against him;"[3] and with him Vattel concurs. The wars undertaken for the preservation of that famous system, known, from its operation, as *the balance of power*, naturally suggested this question. It is one on which no doubt can reasonably be entertained at this day. We have no right even to complain of a neighbor who is enlarging his dominions by colonization, or strengthening his frontier with fortifications, unless we have good reason to apprehend that he is meditating aggressions on us. If we have reason to suspect that his intentions are hostile, we shall naturally place ourselves in a posture

[1] See the authorities quoted in a note to Martens, Précis, ut inf. cit.
[2] Martens, Précis, IV. i. 3. [3] De Jure Belli et Pacis, II. xxii. 5.

of defence; but assuredly the naked fact that he is increasing his power, and by means in themselves perfectly legitimate, will give no title to our interference.

THE RIGHT TO INDEPENDENCE.—I. This is a right which belongs to every sovereign State as such, and one especially tendered and protected by the law of nations. No nation, unless authorized thereto by compact is entitled to interfere in the internal concerns of another, whether those concerns affect its government, legislation, or its administration of justice. Compact, indeed, in some cases modifies this right. In pursuance of treaties to that effect, the kings of Denmark were empowered to arbitrate in any differences that might arise between the kings of Sweden and their senates; and the kings of Sweden had similar authority in cases of disputes in the Danish government. The princes and States of West Friesland in like manner agreed to submit to the decision of the republic of the United Provinces matters on which they were divided; and many other cases of a similar kind might be mentioned. A title of interference may also result from treaties of mediation and guarantee. Thus, France and Sweden, at the peace of Westphalia, in 1648, guaranteed the Germanic constitution on the basis on which it was then settled; and the constitution of the Helvetic Confederation was adjusted by the mediation [*21] *of the allies, in 1813. So also might the constitution of any of the States composing the Germanic Confederation be guaranteed by the Diet, on the application of the State itself; the Diet then acquired a right to determine the construction and enforce the maintenance of the constitution so guaranteed. (1 Wheat. 132.) It is usual when intestine divisions vex a State, for one or more of those States with whom it is in amity to proffer their mediation to compose the differences that may unhappily have arisen; and the acceptance of such an offer by both parties gives to the State offering the right to interfere.

II. There are other circumstances under which this right originates; and modern history has recorded the establishment of a league styling itself the Holy Alliance,[4] whose object was to check the progress of revolutionary principles and to sustain the menaced monarchical institutions of Europe. The justification of such an association is to be found in the peculiar circumstances of the times, which rendered it a measure of absolute necessity on the part of States not prepared to surrender their freedom of action. The considerations which govern the policy of the British Government in such matters may be learnt from a declaration of the Court of St. James's issued in consequence of the steps taken by Austria, Russia and Prussia, alarmed by the success of the Neapolitan revolution of 1820. These were steps which the Government of Great Britain esteemed inconsistent with the undoubted right of every nation, as far as its neighbors were concerned, to establish what constitution was agreeable to its wishes. Great Britain, on that occasion, admitted the right of interference so far as a regard to the independence of other States made an interference necessary, but still it regarded the assumption of

[4] At Paris, Sept. 26, 1815, between Russia, Austria, and Prussia. Martens' Recueil, Supp. vi. 656.

such a right as only to be justified by the strongest necessity, and to be limited and regulated thereby. The exercise of such a right it considered as an exception to general principles of the greatest value and importance, and as one that properly grows out of the special circumstances of the case, but at the same time considered that exceptions of this description can never, without the utmost danger, be so far reduced to rule as to be incorporated into the ordinary diplomacy of States or into the institutes of the law of nations.[5]

III. The intervention of France with the affairs of Spain in 1822, which led to the overthrow of the Spanish constitution, was also protested against on similar grounds by the British Government. It declared the original alliance between Great Britain and the other powers to have been "an union for the reconquest and liberation of a great proportion of the European continent from the military dominion of France, and having subdued the conquerer, it *took the state of possession as established by the peace under the protection of the alliance. It was [*22] never intended as an union for the government of the world or for the superintendence of the internal affairs of other States."[6] "No proof was produced to the British government of any design on the part of Spain to invade the territory of France; of any attempt to introduce disaffection amongst her soldiery; of any project to undermine her political institutions; and so long as the struggles and disturbances of Spain should be confined within the circle of her own territory, they could not be admitted by the British Government to afford any plea for foreign interference. If the end of the last and the beginning of the present century saw all Europe combined against France, it was not on account of the internal changes which France thought necessary for her own political and civil reformation, but because she attempted to propagate first her principles and afterwards her dominion by the sword."[7]

IV. The interference of the Christian Powers of Europe in behalf of the Greeks, when groaning under the oppression of Ottoman misrule, was without doubt, prompted by a desire to rescue a gallant and Christian people, to whom Europe was most deeply indebted, from the fate to which the cruelty and cupidity of their governors had consigned them. Instances might have been cited from the history of international law which would have sanctioned an interference on a religious ground. From the time of the Crusades to the sixteenth century, when Protestant States confederated together to secure religious freedom to the Protestant citizens of Roman Catholic communities, examples of this kind might have been gathered; but it was thought more prudent in the treaty of alliance (London, July 6, 1827) to state the casus fœderis in other terms. In the preamble of the treaty it is set forth, that the contracting parties were "penetrated with the necessity of putting an end to the sanguinary

[5] Lord Castlereagh's Circular Despatch. Papers laid before Parliament, Session 1821.

[6] Confidential Minute of Lord Castlereagh on the Affairs of Spain, May, 1820. Additional Papers laid before Parliament, April, 1823.

[7] Mr. Secretary Canning to Sir Charles Stuart, 31 March, 1823, Papers, April, 1813, p. 57.

contest which, by delivering up the Greek provinces and the isles of the Archipelago to all the disorders of anarchy, produces fresh impediments to the commerce of the European States, and gives occasion to piracies, which not only expose the subjects of the high contracting parties to considerable losses, but besides render necessary burdensome measures of protection and repression."

V. As a consequence of the independence of a nation, its laws affect and bind directly all property within its territory, and all residents, native and foreign, and all contracts made and acts done within it. They may regulate the acquisition, enjoyment, and transfer of property within its [*23] territory, fix the civil rights, capacities, and *states of those who become its subjects by birth, domicile, or even temporary residence; they may determine the validity of contracts and other acts done within it, and the legal import which those contracts shall bear; and they may establish the forms and proceedings by which the judicial tribunals may entertain, investigate, and adjudicate on claims, and permit the execution within its own territory of foreign judgments.

VI. They do not, proprio vigore, operate beyond the territory of their State, however they may aspire to do so. Thus, for example, the familiar maxim of English public law, nemo potest exuere patrim, which denies, except it would seem by permission of their sovereign (Doe dem. Thomas v. Acklam, 2 B. & C. 796, see also Bright's lessee v. Rochester, 7 Wheat. Rep. 535), to the lieges of the Crown of Great Britain the right of renouncing their allegiance, has no binding effect upon foreign nations. But upon laws which respect only the private interests of the private man, by what is called the comity of nations (comitas gentium, or as it is sometimes named, *la necessité ou bien public et général des nations*), usually is conferred an extra-territorial operation, provided they do not prejudice the interests of foreign States or the native rights of their citizens. It is, however, perfectly optional in any State to observe this liberality, and usually, in determining whether it will do so or not, it is influenced by the consideration that a similar liberality is accorded to or withholden from its own subjects.

VII. To consider fully the important questions which arise out of what is called the jus gentium privatum and the collisio legum, or conflict of laws, would be foreign to the plan of this work. It will be sufficient to state generally what are the doctrines of the English Courts upon the subject, as in respect of English subjects foreign countries usually pursue a similar course.[8]

VIII. "Our laws, like those of every other country, have, by the comity of nations, an extra-territorial operation. Generally speaking, such of them as define the status or civil condition and capacity of our subjects travel with them wherever they go, and their obligation it is not

[8] The following extract is taken from the Treatise on English Law, contributed by myself to the Encyclopedia Metropolitana, Div. I. ii., 821-2. The subject is one of great difficulty, and, as it is incapable of being brought under the dominion of strictly determinate principles, cannot satisfactorily be discussed in a brief space. Mr. Burge's and Judge Story's works upon it, are too well known to require recommendation here.

possible for them to escape. Such are laws which may properly be styled *personal*, determining whether a man be legitimate or illegitimate, under or of full age, insane, an idiot, bankrupt, or divorced, and the like. As to laws governing the succession to an intestate's property, it is doubtful whether our law operates extra-territorially. The incidents to these qualities may depend on the law of the country, to which the citizen goes, but as *qualities they will, by the general comity of nations, be generally recognised by foreign tribunals. These will also give [*24] effect to our laws, unless, indeed, inconsistent with the rights and interests of the citizens of their State, or with its public policy and fundamental laws. Our law acknowledges the validity of contracts entered into in a foreign country, and there intended to be performed, if they are valid according to the law of that country (The King of Spain v. Machado, 4 Russ. 225; Potter v. Brown, 5 East, 130); for if an obligation is valid where it is professed to originate, it is valid everywhere else. Not only does our law recognise a marriage esteemed valid where it was contracted (Lacon v. Higgins, 1 D. & Ry. 38), but it does not generally recognise marriages celebrated abroad unless there considered valid. (Butler v. Freeman, Amb. 303; but see Ruding v. Smith, 2 Hagg. 385.) A court of equity, with that liberality which is its proper characteristic, has so far taken cognizance of a foreign law as to have forborne to compel a husband to make a settlement upon his wife, entitled to a share of his personal property under the (English) Statute of Distributions, on its being proved that the wife was resident in Prussia, and that by the law there a moiety of the husband's effects must have come to her.—Sawyer v. Shute, 1 Ans. 63. See also 3 Ves. 323.

IX. "The process, however, by which foreign contracts are to be enforced here, must be such as is known to our law. (The Vernon, 1 W. Rob. 319.) So a foreigner may be here arrested for a debt, or in equity upon a writ of ne exeat regno, although by the law of the place where the debt was contracted he could not have been imprisoned (De la Vega v. Vianna, 1 B. & Ad. 284; Flack v. Holm, 1 J. & W. 405,) a doctrine which has been carried so far as to justify proceedings against a person as partner, because he was jointly concerned in trade with another in Holland, although partnership does not there arise from such a community of business.—Shaw v. Harvey, Mood. & Malk. 526.

X. "Further, as to the time of commencing proceedings, the English courts will have regard not to the lex loci, but to the English statutes of limitation.—The British Linen Company v. Drummond, 10 B. & C. 903.

XI. "Our law also, it would appear, claims to determine the interpretation of every deed or will executed here (Trotter v. Trotter, 4 Bligh, N. S. 502; Anstruther v. Chalmers, 2 Sim. 1,) although it is doubtful whether, in devises of lands, the tribunals of the country where the lands lay would accord them this jurisdiction.—Vattel, 11, viii. 3; 1 Wheat. 136.

XII. "'No country ever takes notice of the revenue laws of another,' (per Lord Mansfield, C. J., Holman v. Johnson, Cowp. 343; and see 2 Peake, 81, and 1 Esp. 389,) nor will ours admit the operation within its limits of any foreign municipal law contrary *either to its public policy or to the law of nature. A slave, a native of East Florida, [*25]

where the law countenances slavery, escaped to a British man-of-war, and it was held that, coming under the protection of our colours, he relieved himself from the operation of a local law of East Florida, which was contrary to the natural law of eternal justice.—Forbes v. Cochrane, 2 B. & C. 448; and see the case of Somerset the Negro, and Hargrave's note, Co. Litt. 79 *b*."

XIII. Sovereigns and their diplomatic representatives, while in a foreign country, are considered not amenable to its laws; so also is a foreign fleet or army while within the territorial jurisdiction of a friendly State. The vessels public and private of every nation on the high seas are considered as subject to the jurisdiction of their own country.

XIV. With the exceptions above mentioned, the judicial power of every independent State extends,—

i. To the punishment of offences against the laws of the State committed by foreigners, as well as subjects, within its territory or on board its vessels, on the open seas or in foreign ports, and to the punishment of piracy and other offences against the law of nations. ii. To all civil proceedings in rem, relating to personal or real property within its territory; and iii. To all controversies respecting personal rights and contracts, or injury to the person or property, when the party resides within the territory, wherever the cause of action may have originated.[9]

THE RIGHT TO EQUALITY.—1. One of the fundamental principles of public law generally recognised is, according to Sir William Scott, "the perfect equality and independence of all distinct States. Relative magnitude creates no distinction of right; relative imbecility, whether permanent or casual, gives no additional right to the more powerful neighbor, and any advantage seized on that ground is mere usurpation. This is the great foundation of public law, which it mainly concerns the peace of mankind, both in their politic and private capacities, to preserve inviolate."[10] This great principle is, however, somewhat modified in its application, both by the usage of nations and by compacts, whereby the forms of international etiquette are defined and established. These may be considered as they relate to the relative rank and precedence of States, to their titles, to the language employed in their negotiations, and to their maritime ceremonials.

II. Certain honors, denominated royal, are enjoyed by the empires and kingdoms of Europe, by the Pope, by the grand duchies of Ger-
[*26] many, by the Germanic and Swiss Confederations, and, as *we presume, the United States of America.[11] The right to send and receive an embassy of the first order, the right of preceding all other States, together with several distinctive ceremonies, properly make part of the *royal honors*.[12] By the Roman Catholic Governments, precedence is yielded to the Pope, who by the Protestant is considered simply as the sovereign of the Roman States. Some text writers appear disposed to consider the great republics inferior in point of precedence to crowned heads; but these States have never acknowledged their inferi-

[9] 1 Wheat. 158. [10] The Le Louis, 2 Dod., 243.
[11] This State never accredits ministers of the first class to any foreign power.
[12] Martens, Précis, IV. ii. 3. Vattel, II. iii. 37.

ority, and the question has been, by tacit consent of all parties, suffered to fall into obscurity. Indeed the whole question of relative rank, as far as concerns States enjoying royal honors, was felt to be so doubtful as well as so delicate that, at the discussion, in the Congress of 1815, of the report of a committee appointed specially to consider the subject, it was resolved to leave it in its original state of uncertainty. The usage at present, as it appears, may probably be stated thus :—

i. Monarchs enjoying royal honors, without being crowned heads, give precedence on all occasions to crowned emperors and kings. ii. Monarchs not enjoying royal honors, yield precedence to such as do. iii. Below this last class rank demi-sovereigns, or dependent States.

III. This matter of precedence never having been formally settled, various expedients are resorted to in order to avoid an inconvenient contest at the period of a negotiation, without compromising the rights of any party. Of these the best known is the usage of the *alternat*, by which the rank and places of various powers is changed from time to time in a certain regular order, or one determined by lot. For instance, in treaties between two powers two copies are prepared, and each power, in the copy it keeps is named first. If there are several parties to the treaty, the same number of copies is made, and the same usage observed. The right of this alteration has sometimes been denied to certain States. The King of Great Britain refused to recognize the title of the King of Prussia, to this privilege, in 1742, and Hungary and Sardinia experienced great difficulties in obtaining admission to the alternation at the peace of Aix-la-Chapelle, 1748.[13] Sometimes it is arranged that the signatures to a treaty shall range according to the order assigned by the French alphabet to the respective powers parties thereto.[14]

IV. While it is competent to any State to confer what title it [*27] *pleases on its prince or chief magistrate,[15] it is not incumbent on foreign States to recognize that title, and sometimes when they do recognize it, a condition is annexed to the recognition. France and Spain recognized Russia as an empire, stipulating that the title of emperor should not affect the sovereign's precedency; but the Empress Catherine II., on her accession in 1762, refused to renew this stipulation, declaring, at the same time, that the imperial title should not alter the ceremonial between the two Courts. France, in turn, renewed her recognition, with a declaration that if any such alteration were made, she would cease to give the imperial title to Russia. Neither the royal title for Prussia nor the imperial title for Russia were generally acknowledged until the Powers of Europe had successively consented to them.[16]

[13] Martens, Précis, IV. ii. 6.

[14] It was in this way the plenipotentiaries at the Congress of Vienna signed —Austria, Denmark, Spain, (Espagne), France, Great Britain, Prussia, Russia, Sweden, but it was distinctly understood at the time that this practice was not to be taken as derogating from the ancient usage of the alternat. C. Martens' Guide Diplom. par Hoffmanns, I. iii. 1.

[15] Anciently the Pope and the Emperor of Germany claimed the right of conferring the royal dignity on any house they pleased. In this way the Emperor Henry IV., in 1086, made the Duke of Wratislaw King of Bohemia, and Pope Eugene made Alphonso King of Portugal. The Pope for a long time refused to acknowledge Frederick as King of Prussia.

[16] Martens, Précis, IV. ii. 2.

V. With respect to the language employed in negotiation, in the early periods of diplomatic history, the Latin, as the European language, was that generally used; and this, towards the end of the fifteenth century, was, in consequence of the political influence of Spain superseded by the Castilian tongue, which, in its turn was supplanted by the French, now the most usual medium of diplomatic intercourse. At the Congress of Vienna, all matters, not exclusively German, were discussed in this language, but the Germanic Diet (June 12, 1817,) at Frankfort, solemnly decreed that, in its foreign relations, the German was the only tongue it would employ; annexing, however, to the original a French or Latin translation as might be required. This decree, seemingly inconsistent with the courtesy that should mark the intercourse of nations, has not, it is believed, been rigorously enforced. Some nations, as Spain, and the German-Italian States, employ their own language; but it is customary for them, when treating with a power whose language is different, to transmit a translation of the treaty in the language of that power, if it is understood that the courtesy will be reciprocated. The Ottoman Porte considers no treaty in other than the Turkish language, obligatory upon it, but this language the European Powers will not suffer to be used towards themselves in diplomatic transactions, so that treaties in which the Porte joins as a contracting party, are usually dispatched in several tongues. When both contracting parties have a common language, their treaties are worded in that language.[17]

VI. With respect to maritime ceremonials, it may be observed that they have frequently formed subjects of contest between powers. The [*28] honors they involve are paid either by a salute *with cannon, a salute with a flag, or with the pendant, by furling it up, lowering it, or hauling it quite down; or by a salute with sails by lowering, or hauling down the foretopsail.[18] As far as its own maritime jurisdiction extends, every State may impose what regulations it pleases in respect of these ceremonials, but they are usually made the subject of express compact. On the open seas it is usual for the admiral to be saluted by a ship carrying only a pendant, if the ship belongs to a friendly power; and detached ships generally salute fleets.[19]

THE RIGHT TO PROPERTY.—I. "The dominion of a nation," says Vattel, "extends to every thing which she possesses by a just title. It comprehends the ancient and original possessions, and all acquisitions made by means which are just in themselves, or admitted as such by nations—concessions, purchases, conquests made in regular war, &c."[20]

II. How far prescription may be considered as operating upon nations, jurists do not appear to have agreed; but the uniform practice of nations shows that they recognize the long and uninterrupted possession of a territory as excluding the claims of all other nations, and that this principle, whose exposition fills so large a head in municipal jurisprudence, is equally recognized, as reason dictates that it should, in international law.

III. As to the national possessions, of which, they being of compara-

[17] 1 Wheat. 198-9.
[18] Martens, Précis, IV. iv. 15. [19] Martens, ib. § 17. [20] II. vii. 80.

tively recent acquisition, other sources of title are acknowledged:—When the Russian Government claimed the sovereignty of the north-west coast of America, from Behring's Straits to the 51st degree of northern latitude, they rested their claim "upon the three bases required by the law of nations, that is, upon title of the first discovery; upon the title of first occupancy; and, in the last place, upon that which results from a peaceable and uncontested possession of more than half a century;"[21] a space of time longer than that during which the United States had enjoyed a national existence. As to the two first sources of title named by the Russian envoy, they are unquestionably good as against every nation except that nation whose liberties their assertion may prejudice. The right of a State in quality of her superior power—the power lent her by her civilization—to subject to her dominion a territory inhabited by another people, be they ever so savage, may be questioned on the principles of the law of nature, however consistent with the customs, and therefore with the law of nations. Vattel discusses the question, which is that of almost every European colony, "whether it be lawful to possess a part of a country inhabited only by a few wandering tribes?" and he justifies his reluctant assent in the affirmative *on the ground that these tribes "cannot exclusively appropriate to themselves more land than they have occasion for," and that "their unsettled habitation in these immense regions cannot be accounted a true and legal possession."[22] An argument framed with a view to a conclusion does not deserve much mercy, and it may fairly be asked, *who* is to be judge of the necessities of these tribes? Their usual occupations, hunting and fishing, notoriously require a large range of territory to enable them to support subsistence. Again, how, on Vattel's principles, can the integrity of the Russian Empire, with its 150 inhabitants to every square mile of territory, be secured? Australia contains perhaps 5,000,000 of square miles, and a population truly insignificant. Surely this jurist's principle would impugn the inviolability of our dominion over that vast continent. [*29]

IV. Still, as a fact, it is not to be denied that in savage countries the rights of the natives have, in every instance, been treated as subservient to those of the first Christian or civilized settler. Vattel's principle was carried further on one occasion by the British Government, who, when Spain, on the ground of prior discovery and long occupation, confirmed by the Treaty of Utrecht (in 1713), claimed the sovereignty of the north-west coast of America, as far north as Prince William's Sound (lat. 61°), asserted "that the earth is the common property of mankind, and of which each individual and each nation has a right to appropriate a share by occupancy and cultivation."[23] This is almost the language of

[21] Le Chevalier Poletica to Mr. John Quincy Adams (American Secretary of State), Ann. Reg. LXIV. 579.

[22] I. xviii. 209.

[23] 1 Wheat. 211. A singular admission of the rights resulting from discovery appears in the conduct of the Turkey Company in 1581, who being desirous of engaging in the Indian trade, and considering the passage round the Cape, discovered by the Portuguese, to be their exclusive property, and not to be interfered

the German chieftian of Nero's time: *Sicut cœlum diis, ita terras generi mortalium datas, quæque vacuæ, respublicas esse.*

V. As to the extent to which the right of property operates; and first, as to the *sea*,—So much of the sea as is included within the territories of a State (such as St. George's Channel, which runs between England and Ireland) is considered as belonging to that State. And thus all harbors, ports, bays, and *embouchures* of rivers are considered as belonging to the State whose land forms their boundaries. The usage of nations has, for obvious reasons, extended this possession to as much of the open sea as lies within cannon range (that is, about three miles) of the shore,[24] in obedience to the maxim, *Terræ dominium finitur, ubi finitur armorum vis.* The term *shore* includes not only what is generally so denominated, [*30] but all islands lying off the coast, although not sufficiently firm for habitation;[25] but it does *not include shoals. By the 9th Geo. II., c. 5, a jurisdiction of four leagues from the shore is assumed by the British Government for revenue purposes, so that foreign goods transhipped within those limits are subject to the payment of duties.

VI. Being "a claim of private and exclusive property over a subject where a general, or, at least, a common use is to be presumed," says Sir William Scott, "the general presumption certainly bears strongly against such exclusive rights, and the title is to be established on the part of those claiming under it in the same manner as all other legal demands are to be substantiated—by clear and competent evidence."[26] Still the property in whole seas have at various times been claimed by various nations. Thus the possession of the Indian seas was claimed by Portugal, while the Venetian republic asserted similar pretentions to that of the Adriatic, the Ottoman Empire to the Black Sea (subsequently renounced by the Treaty of Adrianople in 1829), and Denmark to the Baltic.

VII. The question of *mare clausum* and *mare apertum* was formerly one of considerable interest, and occupies a large place in the writings of jurists. It may generally be stated, that while the sea (subject to the exceptions first mentioned) is for the most part open and common to all nations, as to certain parts the general right may be modified by compact and usage. Even Grotius, the stout advocate of the general right, is forced to admit that this is authorised by numerous passages in ancient writers, to whose authority on other subjects he is, in Mr. Bentham's opinion, always too ready to defer.[27] Father Paul Sarpi, the well-known historian of the Council of Trent, vindicated the claim of Venice to the supremacy of the Adriatic; and Bynkershoek (no mean authority) acknowledges that certain portions of the open sea may become the property of a State, grounding his denial of the claims of England to the Four Seas simply on the fact of a deficient length of possession.[28] Vattel, too, asserts that tacit agreement, evidenced by a non-usage of the general right, may confer property or dominion in a sea.[29]

with, chose the overland route, where they were exposed to the powerful competition of the Venetians.—Macpherson, Hist. of European Commerce with India, p. 75.

[24] Martens, Précis, IV. iv. 4. 1 Wheat. 215.
[25] The Anna, 5 Rob. 385.
[26] The Drie Gebroeders, 5 Rob. 339.
[27] Prin. Morals and Leg. XIX. 29.
[28] Quest. Jur. Pub. II. 21.
[29] Liv. I. xxiii. 286.

VIII. Secondly, as to rivers and lakes. These, when wholly included within the territory of a State, are its exclusive property, and every State is considered as possessed of so much of a river as flows through its territories. If the river divides two States, the mid-channel is considered as the boundary line, unless prior occupation has given to the one or the other the right of possession to the whole. In the case of rivers flowing through several States, all the nations inhabiting its banks possess the right of navigating it for commercial purposes. This is what is called *an innocent use*, *and is considered to be subject to the [*31] convenience and safety of any State which its exercise may affect. This innocent use appears to involve the right of doing whatever is necessary to its enjoyment, such as mooring vessels to the banks, landing cargoes, &c.; but usually these, as well as the general right itself, are settled and determined by convention.

IX. The right of navigation to which we allude may be renounced by treaty, as was the case in the Treaty of Westphalia, whereby the navigation of the Scheldt was closed in favor of the Dutch provinces. The Treaty of Vienna, in 1815, declared that the commercial navigation of the great rivers of Germany and ancient Poland should be open, provided that the regulations of the police were observed. These, it further declared, should be uniform, and as liberal as possible to the commerce of all nations.[30]

§ 2. *International Pacific Rights of Nations.*

Having discussed those rights of nations which are intrinsic and result from their character as nations, we have now to consider such rights as are properly *international*, and originate in their mutual relations, and these are the rights of legation and the rights of negotiation and treaties.

RIGHTS OF LEGATION.—I. Every independent State, or, with the permission of its superior, every demi or quasi independent State, has the right of appointing and receiving diplomatic agents. During the time of the Germanic Empire, the German princes, whose independence was not absolute, enjoyed it, as formerly did the Dukes of Courland; whilst, since 1774, the Hospodars of Wallachia and Moldavia, has each had his Charge d' Affaires at Constantinople under the protection of the law of nations, and possessing the diplomatic character recognised by that law. The laws of each State respectively indicate the person or body by whom diplomatic agents are to be named, and to whom they are to be accredited, and they may also specify the terms on which they will be received, *e. g.*, some States will not receive in a diplomatic quality any of their own subjects, Prussia refuses to receive ecclesiastics as representatives of the Holy See, &c.

II. The law of nations acknowledges no distinction of rank between the various orders of diplomatists. They are all of equal consideration in its eyes; but in the view of European public law the matter is far otherwise. The Congress of Vienna, in 1815, considered them as be-

[30] Pièces Annex. XV. Martens' Recueil, Supp. vi. 434.

longing to three classes. i. The first embraces ambassadors, legates, and nuncios, and these alone possess the *representative character*, i. e., are considered to represent *the *person* of their constituents, so far as to be entitled to the same ceremonial, as the latter would be were they present. ii. The second class includes envoys, ministers, or others accredited to sovereigns, those denominated *extraordinary* not however deriving any precedence or dignity from the possession of that title. iii. In the third class are ranked Charges d' Affaires and others accredited by the foreign minister of one State to the foreign minister of another. The rank of diplomatists is not affected by the family or political alliances of their sovereigns, and those in the same class take rank as between themselves according to the date of the official notification of their arrival; in Roman Catholic States, however, superiority is always conceded to the representative of the Pope.[31]

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III. The authority of a diplomatist originates in the letter of credence with which he is intrusted, and the death either of his own sovereign, or of that to whom he was sent, destroys his official existence, by terminating his mission. His person is inviolable (Martens, Précis VII. v. 1), together with those directly belonging to his embassy and family; he is exempt from the civil jurisdiction of the State in which he resides, and from its criminal jurisdiction also, although this must be taken in a somewhat qualified sense as far as his dependents are concerned. If he commit a private crime against the laws of the State, it is usual for the authorities to demand his recall of his sovereign; if a public crime, it is competent to them closely to confine him until he can be sent safely to the frontiers, although this power of imprisonment for obvious reasons is scarcely ever exercised. (Martens, Précis ib. § 4.) Properly he is not subject to mere police regulations, but it is a principle at present universally recognised in Europe "that when a person is accused of high treason, and it is clear that he has taken refuge in the house of a foreign minister, the Government may not only take the necessary steps out of doors for preventing the criminal's escape, but may also proceed to take him by force when a minister refuses to give him up after he has been solicited by the proper authorities."

IV. To enter into the details of diplomatic ceremonial would be foreign to the purpose of this work. Baron Charles de Martens Guide Diplomatique, (the best edition is that by Hoffmanns, Paris, 1837,) an dthe Rev. Thomas Hartwell Horne's valuable Essay, which, having appeared in the Encyclopædia Metropolitana is added to this dissertation, may be referred to by those interested in the subject. As far as the *principles* of international law are concerned, it is sufficient to say, that whatever ceremonial is by the public law of a country to be observed towards *diplomatic agents, the law of nations esteems that observance the due of *every* such agent, and a State arbitrarily withholding it from one whilst conceding it to others is guilty of an infraction of inter-

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[31] Martens' Recueil, Suppl. vi. 449. The distinctions enumerated only received *confirmation* from the sanction of the Congress of Vienna. They were known and recognized in Europe throughout the last century.

national law, and liable to the penalties with which such infractions are properly punishable.

As to THE RIGHT OF NEGOTIATION :—I. Certain public conventions are effected by subordinate powers, authorized thereto by the terms of their commissions and the nature of their duties. Thus the governor of a town and the general who besieges it have a power to settle the terms of the capitulation, and the authority to effect such an agreement being involved in their respective offices, the capitulation is obligatory on the States whose servants and representatives they are.

II. Admirals and generals have usually authority, within the extent of their commands, to grant special licenses to trade, cartels for the exchange of prisoners, and truces for the suspension of hostilities; and these are conventions to the validity of which the ratification of their principals is not required, unless by express stipulation.[32]

III. "By the Latin term *sponsio* we express an agreement made by a public person who exceeds the bounds of his commission, and acts without the orders or command of his sovereign."[33] Conventions of this kind are not valid until they are ratified (The Hope and others, 1 Dods. 230,) which may be done either formally or by implication, as if one of the States whose agents effected the convention should cause troops to pass through the territories of the other on the footing of friends; this would be considered as a tacit ratification of the convention. Mere silence would not be so construed, although good faith requires that if one State does not purpose to recognize the acts of its servant, it should notify the fact to the other. If on the belief that the agent was duly authorized, the convention has been wholly or partially acted on by one party, it would seem it has a claim to be indemnified or replaced in its former position.[34]

IV. A minister, properly to conclude a public treaty, ought to be fully empowered by his State to do so; but before the treaty can be considered binding on the contracting parties, it is usual to require that it should be ratified by them. This power of ratification is generally reserved in a treaty, and no State should refuse to exercise it without a powerful reason, such as that the minister has not followed his instructions.[35]

V. It is for the internal constitution of every State to determine in whom the right of negotiating and effecting treaties resides; but treaties *so far as they are lawfully made are obligatory on the State. When the treaty requires the payment of money to carry it into [*34] effect, the legislature are morally bound to pass the law, because to the performance of the treaty the public faith has been pledged by competent authority. In such a case, however, it is usual for the British Government to stipulate in the treaty that the crown will recommend to parliament to vote the necessary moneys. If the treaty involves an alienation of the public domain, whether it be public or private property, it would seem to be obligatory on the party so contracting, provided it were negotiated by those clothed by their respective States with the whole treaty-making power. And thus in a case decided by the Supreme Court of the

[32] Vattel, II. xiv. 207. 1 Wheat. 290-1.
[33] Vattel, II. xiv. 209. II. i. 3.
[34] 1 Wheat. 291.
[35] 1 Wheat. 192.

United States, it was held as a clear principle of national law that private rights might be sacrificed by treaty to secure the public safety; although it was admitted—and Grotius is an authority on the point—that the Government would be bound to compensate the individuals whose rights might be surrendered.[36] The fundamental laws of a State may deny to the treaty-making power the right of thus alienating the public domain; in such a case the whole treaty-making power is not intrusted in one department of the State, and no treaty involving such an alienation would be obligatory, unless it were ratified by the legislature. Commercial treaties often require legislative sanction; and the commercial treaty of Utrecht, between France and England, was never carried into effect, parliament having rejected the bill necessary for that purpose.

VI. Compacts between nations are either transitory covenants (pacta transitoria) or treaties (fœdera,) properly so called. When a transitory covenant has been fulfilled, and has continued without being renewed, or its future duration has been defined by the contracting parties, it still continues in force. Change in the person of the sovereign, the form of the government, or the sovereignty of the State, does not impair its validity, if any one of the parties do not violate it. A war only suspends a convention of this kind, and the return of peace restores its operation. Such are treaties of a first boundary or exchange of country, &c.[37]

Treaties cease to be obligatory when the sovereign power with whom they were made ceases to exist—when one of the States contracting changes her internal constitution so as to render the treaty inapplicable to her condition—and when a war breaks out between the parties. These two last rules are subject to exceptions. As to the first:—

Jurists distinguish between real and personal treaties. Personal treaties depend for their continuance on the person of the sovereign, or ruler,
[*35] *or his family. The former bind the State. The death of the ruler, extinction of his family, or the severance of his or their political connection with the State, dissolve the latter. Political revolutions do not affect a treaty which is real.[38] The reader is referred to the Essay on Diplomacy, already mentioned, for further information connected with this subject; the ceremonial etiquette connected with legations is therein fully detailed and explained.

[*36] *Section VI.

BELLIGERENT RIGHTS OF NATIONS.

The law of nations recognizes the right of independent States to redress

[36] Ware v. Hylton, 3 Dallas, Amer. Rep. 199, 245. Grotius de Jure Belli et Pacis, III. xx. 7.
[37] Martens, Précis, I. i. 7. Vattel, II. xii. 192. 1 Wheat. 296.
[38] Martens, Précis, ib. § 5.

their injuries or vindicate their dignity, by having recourse either to Reprisals or to War, and prescribes the limitations and conditions, subject to which this right is to be exercised.

(i.) REPRISALS.[1]—These are of two kinds:—negative, when a State refuses to fulfil its obligations, or to permit another nation to enjoy rights which it claims. They are positive, when they consist in seizing persons and effects belonging to the other nation in order to compel them to give satisfaction.[2] Reprisals may also be either general or special. They are styled general when a State, which has, or supposes it has, received an injury from another, formally commissions its subjects to take the persons and property of the other State wherever they may be found. "I do not," said De Witt, "see any difference between general reprisals and open war."[3] They are, in fact, according to modern usage, the first step taken at the commencement of a war, and considered equivalent to a declaration of hostilities, unless an immediate satisfaction is made by the other State.[4] *Special* reprisals are where letters of marque are granted in time of peace to individuals who have suffered an injury from the Governments or subjects of another nation. These were common in very early times in England, and were specially authorised by the 4th Hen. V., cap. 7. *They have been regulated by treaties; by those of Munster between Spain and Holland in 1648; by those between [*37] England and Holland in 1654 and 1667; by that of Ryswick in 1697; and of Utrecht in 1713; by the French Ordinance of Marine in 1681; by the Articles of Confederation of the United States of America in 1781, and by the treaty between that republic and the republic of Columbia in 1825 (1 Kent, Comm. 61.) This kind of reprisals in the time of peace has, however, been condemned generally by the jurists, and has fallen into almost total and deserved disuse. The effect of the confiscation of the property of a foreign State antecedent to an open rupture is ably explained by Sir W. Scott, on occasion of an embargo laid on Dutch property, after the breach of the treaty of Amiens in 1803, under circumstances which Great Britain considered an hostile aggression on the part of Holland: The seizure, he said, was at first equivocal, and if the matter in dispute had terminated in reconciliation, the seizure would have been

[1] Many writers on the law of nations have discussed, in connection with this subject, the law of retaliation, lex talionis. This is not, however, a sanction of the law of nations, as it is not a punishment for the violation of any principle of that law. Retaliation ensues the breach of what are called imperfect obligations, and which do not justify a resort to forcible measures. Where a State, for instance, is guilty of the breach of a simple custom, or establishes some partial right or law prejudicial to foreigners, the State whose citizens are prejudiced retaliates by exposing the citizens of the offending State to similar disadvantages. This is amicable retaliation (retrosion de droit.)—Martens, Précis, VIII. i. 2. Vattel, II. xviii. 339-41; 2 Wheat. 4. Reciprocity or mutuality has always been esteemed as one of the leading principles of justice in questions arising between nation and nation. The Girolamo, 3 Hagg. 185.

[2] 2 Wheat. 5.

[3] Vattel, II. xviii. 345 n.

[4] Per Lord Mansfield, Lindo v. Rodney, ubi cit. The Syracusans, in the time of Dionysius the Elder, voted a declaration of war, and immediately seized the Carthaginian property in their warehouses, and the Carthaginian ships in their ports, and then sent a herald to Carthage to negotiate. Mr. Mitford considered this a breach of the law of nations. Hist. Greece, v. 402-4.

converted into a mere civil embargo and so terminated. Such would have been the retroactive effect of that contrary course of circumstances. On the contrary, if the transaction end in hostility the retroactive effect is exactly the other way.—The Boedes Lust, 5 Rob. 246.

(ii.) WAR is defined by Vattel, as "that state in which we prosecute our right by force." It is with public war alone (that is, war carried on between independent nations) that the law of nations concerns itself. It may be *perfect* or *imperfect*, *civil* or *national*, *offensive* or *defensive*.

I. A *perfect* war is, where a whole nation, is at war with a whole nation, and all the members of one are presumed engaged in hostilities against all the members of the other. An *imperfect* war is limited, as to persons, places, and things, as was the case with the hostilities authorised by the United States against France in 1798.[5] A civil war is a war between members of the same State, and according to Grotius, is a *public* war, as far as the Government is concerned, and *private* on the part of the insurgents. A *national* war is a war between nation and nation, undertaken and carried on by the authorities, according to the political organization of the nation, constitutionally competent so to do.[6] A war is *offensive* on the part of the sovereign who commits the first act of violence against the other. It is *defensive* with him who receives the first blow.

The sovereign power is alone possessed of authority to make war; a civil war of course does not fall within this observation.[7]

II. As far as the law of nations is concerned, every war commenced, [*38] and prosecuted in form, and consistently with its principles, *is just. The right of determining under what circumstances it shall take up arms is the natural prerogative of every State, and is incidental to its right of independence. The law of nations simply regulates this right by prescribing the mode in which it shall be exercised.

III. The custom of making a declaration of war to the enemy, previous to the commencement of hostilities, is of great antiquity, and was practised even by the Romans.[8] Louis IX. would not attack the Sultan of Egypt until he had sent him a herald to announce his intention of doing so. The earlier jurists, with the exception of Bynkershoek, generally consider a war, undertaken without this previous declaration, to be contrary to the law of nations,[9] and Grotius bases its necessity, not on the ground that an enemy may be put on his guard, but that it may be clear that the war is undertaken, not by private persons, but by the authority of the community.[10] Since, however, the peace of Versailles, in 1763, such declarations have been discontinued, and the present usage is, for the State with whom the war commences to publish a manifesto within its own territories, communicating the existence of hostilities, and the

[5] 2 Wheat. 10. [6] Martens, Précis, VIII. ii. I. [7] Vattel, III. i. 4.
[8] Cicero, De Off. I. 12. Dig. XXIX. xv. 24.
[9] Grotius, De J. B. et P. I. iii. 4. Puffendorf, VIII. vi. 9. Vattel, III. iv. 66. Bynkershoek, Quest. Jur. Pub. I. 12. See Sir William Scott's judgment in The Nayade, 4 Rob. 252
[10] De J. B. et P. III. iii. 11.

reasons for the commencement.[11] The publication of this manifesto was looked on as so essential, that nations have demanded a restitution of everything taken before such publication;[12] but although this publication is usual, as being necessary for the direction of the subjects of the belligerent State,[13] it may be questioned whether its omission would have such an operation.[14] When war has once been declared, whether by manifesto or by acts equivalent thereto, it is a war not simply between Governments in their political capacities, but binding on their subjects.[15]

IV. A nation in a state of war is considered authorised, on general principles, to seize the persons and confiscate the property of the enemy's subjects being within its own territory.[16] This is a principle which modern usage has practically modified to a considerable extent. Grotius himself considers that as far as respects debts due to private persons, the right of demanding is only suspended by the war. Vattel, while admitting the general principle, qualifies it by the exception of immovable property (les immeubles), *held by the enemy's subjects within the belligerent State, and which, having been acquired by the consent of the sovereign, cannot be sequestrated without a breach of faith. Debts and other things in action, he holds liable to seizure. He at the same time admits that "at present the advantage and safety of commerce have induced all the sovereigns of Europe to relax from this rigor. The State does not touch even the sums which it owes to the enemy; everywhere, in case of war, the funds confided to the public are exempt from seizure and confiscation." In the absence of express convention, by which this matter is sometimes regulated, the modern rule, according to Dr. Wheaton, is, that neither the property of the enemy within the belligerent State, nor the debts due to his subjects, are confiscated on the breaking out of war.[17] In England it has been usual, in maritime wars, for the government to seize and condemn, as droits, of Admiralty, the property of the enemy found in her ports at the breaking out of hostilities; but as to the debts due to his subjects, we consider them as only suspended by the war, and as restored by the peace.[18] Our ancient law was, however, much more liberal than this,[19] and, in comparatively modern times, the subjects of an enemy "residing here and demeaning themselves dutifully, and not corresponding with the enemy," have been, with their effects, taken under the special protection of the crown.[20]

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V. It would appear that persons *domiciled* in the enemy's country are subject to reprisals as well as the natives.[21] The nature of the residence

[11] 1 Kent, 54. War may exist between two countries, without a declaration of war on either side. A unilateral declaration of war is proof of the existence of a war between both countries. The Eliza Ann, &c., 1 Dods. 247.

[12] Martens, Précis, VIII. ii. 4. [13] 2 Wheat. 11.

[14] 2 Kent, 54. See 3 Campbell, 66. The Herstelder, 1 Rob. 114.

[15] Vattel, III. v. 70.

[16] Martens, Précis, VIII. ii. 5, quoting Grotius, Puffendorf, and Wolf. Finch, Law, 28. [17] 2 Wheat. 18.

[18] The Hoop, 1 Rob. 196. Ex parte Bousmaker, 13 Ves. Jun. 71. Furtado v. Rogers, 3 B. & P. 191. The Nuestra Senora de los Dolores, Edw. 60.

[19] See Magna Charta, ch. xxx. and 27 Edw. III. stat. ii. cap. xvii. 1 Hale, Pleas of the Crown, 93. Bro. tit. Property, pl. 38.

[20] Foster, Crown Law, 183. [21] Grotius, De J. B. et P. III. ii. 7.

which constitutes the domicile is determined in several cases decided by our courts.[22] If a person during hostilities enters a house of trade in the enemy's country, or continues a connection with such during war, his residence in a neutral country will afford him no protection.[23]

VI. There is no principle of international law more undoubted than that which prohibits all trade between belligerent nations, unless authorized by their Governments,[24] as it renders void all commercial contracts between subjects of the same. A remittance of supplies to a colony during its temporary subjection to an enemy is equally prohibited, although permission had been given to export the produce of that colony.[25] Numerous expedients have been resorted to by English merchants to evade
[*40] the operation *of this rule; but they have been effectually defeated, by the determination of our municipal courts to enforce it with the utmost strictness.[26]

The rule extends equally to allies: "between allies," says Sir William Scott, "it must be taken as an implied, if not express contract, that one State shall not do anything to defeat the general object. If one State admits its subjects to carry on an uninterrupted trade with the enemy, the consequence may be, that it will supply that aid and comfort to the enemy which may be very injurious to the protection of the common cause, and the interest of its ally."[27] This prohibition operates of course no further than the necessity which justifies it, and has no existence when the trade is of such a nature as can in no manner interfere with the common operations, or when it has the allowance of the confederate state.

VII. The modern law of nations prohibits those barbarous customs which distinguished the warfare of early times. Considering war simply as a means to protect nations in the enjoyment of their just rights and lawful possessions it condemns all cruelty not absolutely necessary to secure that end. If to anything further than the progress of civilization; and the more general appreciation of the dictates of natural justice, consequent on the diffusion of a purer and sincerer spirit of religion, the benevolent aspect in which war is thus regarded may be ascribed with some propriety to the influence which the writings of Grotius have exercised on international law. Even against the language of some of those authorities, in whom his confidence has been esteemed too implicit, this great and eminently wise publicist has protested, in eloquent terms, against those practises which the customs of the times had sanctioned, and which regarded war as incompatible with moderation, and a regard to the maxims of ordinary humanity. It is in a different spirit that M. Guichard remarks, "Ce droit des gens, quoiqu'en aient écrit les Grotius, les Puffendorf, les Burlamaqui, &c., ce droit si beau en théories, ne cède que trop souvent, dans la pratique, à un droit bien plus certain et bien plus positiff,

[22] The Harmony, 2 Rob. 324. The Indian Chief, 3 Rob. 12. La Virginie, 5 Rob. 99.
[23] 2 Wheat. 70-1. The Citto, 3 Rob. 38. The Portland, ib. 41.
[24] The Hoop, ut cit. ante. The Jonge Pieter, 4 Rob. 83; Potts v. Bell, 8 T. R. 548.
[25] 1 Kent, 61. The Bella Giutida, 1 Rob. 207.
[26] Chitty, Law of Nations, p. 13, 15. [27] The Neptunus, 6 Rob. 406.

celui du plus-fort." Code des Prises, i. xiii. Wolf and Bynkershoek, antecedent to his age, considered that no measures which could injure an enemy were improper; but these writers, however highly esteemed on other points, have not in this prevailed; and a disposition has been constantly manifested, by the enlightened nations of Europe, to mitigate the horrors of hostilities, as far as is consistent with the occasion which produces and justifies them. The laws of war will now occupy our attention.

VIII. It is now universally agreed, that hostilities can be undertaken by none who are not lawfully authorised thereto by the *Supreme power of the state to which they belong. This does not, [*41] of course, prohibit the subjects of a State, when attacked, defending themselves,[28] but it has been contended, though on what principles of justice does not appear, that even such would be treated by the enemy with more rigor than those acting under the express orders of their sovereign.[29] Captures, however made by a private armed vessel, without a commission, are not considered as piratical; but the property seized does not pass to the captors, and with us is condemned to the crown,[30] as prize of war, or, as it is styled, droit of Admiralty. The same result follows when vessels commissioned against one power seize the property of another, with whom war afterwards breaks out. This probably arises from the recognised distinction between maritime and land warfare; but it does not appear to have been approved by Sir Matthew Hale.[31] Modern writers[32] have deprecated the employment of privateers; that is, private cruisers commissioned by the State.[33] The question of the liability of the owners and officers of privateers in damages for illegal acts, beyond the security given,[34] is a question of municipal and not international law, and therefore cannot properly be discussed here; so likewise is their interest in the captures made.[35] It seems to

[28] Vattel, III. xv. 223. Vattel (§ 225) considers this to be a rule relating rather to public law in general than to the law of nations properly so called; but unquestionably it is a rule adopted by the law of nations, by which it is enforced, as is apparent from the difference of treatment to which unauthorized belligerents are exposed from that which the regular combatants are subjected.

[29] Martens, Précis, VIII. iii. 2.

[30] Viner, Ab. Prerog. N. 3, pl. 22.

[31] Hargrave, Law Tracts, 246.

[32] Dr. Wheaton takes credit to the United States for having, by treaty with Prussia, 1785, agreed in no future war with that power to employ privateers. It appears, however, that the privateering system has been carried further by America than any other power, for, during the war with Great Britain, the legislature of New York passed an Act which constituted every association of five or more persons desirous of embarking in the trade of privateering, should it comply with certain formalities, a body politic and corporate, and conferred on it the ordinary corporate powers, 1 Kent, 98, *n.*

[33] "The privateers in our wars are like the Mathematici of old Rome, a sort of people that will always be found fault with, but still made use of." Sir Leoline Jenkin's Works, ii. 174.

[34] 1 Kent, 98-9.

[35] Vattel, III. xv. 229. The Elesbe, 5 Rob. 173. At the common law it would seem that the whole seizure went to the captors: goods that belong to an alien enemy, anybody may seize to his own use, Finch, Law, 17, and per Wright, J., Murrough v. Comyns, 1 Wilson, Rep. 213; but see Home v. Camden; 1 H. Bl. 476, and 2 ib. 533. It is usual to require of the owners of privateers severally,

have been settled, that a cruiser commissioned by two powers is to be treated as a pirate, even although the two powers are allies,[36] and many States have prohibited their subjects from aiding, in any way, the fitting out of private vessels, intended to cruise against the subjects of friendly powers. The French Marine Ordinance of 1681, considered such an act as piratical. (Guichard, Cod. des Prises, i. 4, 1 Kent, Comm. 100.)

[*42] *IX. The law of nations prohibits, as unlawful, the use of certain modes of warfare, such as poisoning,[37] assassination, and according to Martens, the loading of cannon with nails, pieces of iron, &c.[38] The same writer considers as properly exempt from the extremities of war, children, women, old men, and others incapable of bearing arms, and such of the retainers of the army as are not employed in actual warfare;[39] and also soldiers and others actually so employed, who have submitted, and entreated quarter. As to these last, he contends that their treatment will be subject to three considerations:—i. Whether sparing their lives will be consistent with the safety of the conqueror? ii. Whether he has a right to subject them to the lex talionis?[40] iii. Whether they have become his captives through their commission of a crime worthy of death, or whether they are spies, &c.?

X. The distinction to which we have before alluded is founded on the circumstance, that the presumed object of maritime warfare is "the destruction of the enemy's commerce and navigation—the sources and sinews of his naval power, which object can only be attained by the capture and confiscation of private property;" while the object of wars by land is treated as being "conquest, or the acquisition of territory, to be exchanged as an equivalent for other territory lost." In this latter, "the regard of the victor for those who are to be, or have become, his subjects, naturally restrains him from the exercise of extreme rights in this particular."[41]

XI. A prisoner of war is entitled to protection and good usage, but may be strictly confined if he attempt to escape. Officers are frequently liberated on their parole, or word of honor, that they will not serve against the power by which they are released during the war, or during a stipulated time. The exchange of prisoners during the continuance of hostilities is a practice common to all civilized States.[42] The persons of artisans, laborers, merchants, and persons whose occupations are peaceful, it is customary to respect.

XII. As to the enemy's property:—In the rigor of international law,

that they will conduct their cruisers according to the laws and usages of war and the instruction of their government. 1 Kent, 97.

[36] Sir Leoline Jenkins, Works, ut cit.

[37] Armis bella non venenis, gerere debere. Val. Max., VI. v. 1; and see Vattel whose observations are more than usually indistinct, III. viii. 155.

[38] Martens, Précis, VIII. iii. 3.

[39] Ibid. § 4; Vattel, ut cit. sup. 145; Ed. Rev. No. 15, p. 13.

[40] When King John, in 1215, took the castle of Rochester, which had resisted his assault for a long period, he ordered the garrison to be hanged, but Sauvery de Mauleon reminded him of the probability that such treatment would at a future time be retaliated on his own officers. Lingard, Hist. Eng. iii. 1, (new edit.) Compare Rutherforth, Hist. Nat. Law, with Martens, Précis, ut sup. cit. § 5.

[41] 2 Wheat. 84-5.

[42] Vattel, III. viii. 153; Martens, ut cit.

to capture or destroy this is lawful; but this rigor has been modified by the humane usages of nations, which have acquired the force and obligation of laws. The distinction must not, however, be forgotten between hostile operations conducted on land or *at sea. It is [*43] in land warfare that the progress of civilization has the most decisively manifested itself.

XIII. The religious edifices, works of art, repositories of sciences, and public buildings of a decidedly civil character, belonging to an enemy, are considered as sacred from spoliation and destruction by the customs of all enlightened nations.[43] Private property on land is also respected, subject to certain occasional exceptions:—i. Property taken from the enemy in the field. ii. Property in a town taken by storm, after having repelled all overtures for a capitulation; and iii. Contributions levied by a belligerent, for the support of his army and towards defraying the expenses of the war.[44] In a case of extreme necessity, it is lawful to devastate and lay waste an enemy's territory, and to destroy all buildings, &c., therein, as far as is requisite for the success of military operations, but the lawfulness of such proceedings is limited by that necessity in the view of all communities.[45] A departure from these rules will be justified, it is thought, by the lex talionis, which is considered to exercise a vast influence in modifying the humane usages of modern warfare.

XIV. When the capture has been effected, the title to the property so captured is considered, as between belligerents, to pass from the original owner to the captors. The rule of law is, that the transfer is effected by occupation. Occupatione dominium prædæ hostibus acquiri.[46] A possession for twenty-four hours is, according to Grotius[47] and others, essential to this transfer; and although Bynkershoek[48] does not concur, this appears to be sanctioned by modern authority.[49]

XV. In the case of ships and goods taken at sea, the title does not pass until the validity of the capture has been affirmed by a competent prize court of the captor's Government,[50] sitting in its own country.[51] By the practice of Great Britain and the United States, their prize courts may try captures, which have been carried into neutral ports.[52] When the capture has been effected within, or by vessels fitted out within the territorial limits of a neutral State, the tribunals of that State

[43] Vattel, III. ix. 168. In the case of the Marquis de Somerneles, (Stewart's Vice Ad. Rep. 482,) the Vice-Admiralty Court of Halifax restored to the Academy of Arts in Philadelphia a case of Italian paintings and prints, captured on their passage to the United States by a British vessel in the war of 1812, "in conformity to the law of nations, as practised by all civilized countries," and because "the arts and sciences are admitted to form an exception to the severe rights of warfare." 1 Kent, 93.

[44] Martens, liv. VIII. iii. 9. Vattel, ut cit. sup. § 165, 2 Kent, 92; 2 Wheat. 81.

[45] Kent, ut cit. sup.

[46] Voet. ad Pandect LI. i. passim. Goss v. Withers, 1 Burr. 683.

[47] De J. B. et P. III. vi. 3; and Vattel, III. xii. 196. Martens, Précis, VIII. iii. 11.

[48] Quest. Jur. Pub. I. iv. [49] 2 Wheat. 88-9. [50] 2 Kent, 102.

[51] 2 Wheat. 89-90. The Flad Oyen, 1 Rob. 134.

[52] The Henrick and Maria, 4 Rob. 43.

[*44] have jurisdiction to try the capture, and *some, as the price of the permission they afford belligerents to bring their captures into their port, have by their municipal laws, reserved a right of adjudicating on such captures, when the original owners of the captured property have been their subjects, and of restoring their property to them.[53] The right of condemning prizes is one that no neutral State can concede to a consular tribunal sitting within her territories.[54] The sentence of a competent prize court renders the title of the captor conclusive, as far as personal property is concerned.[55] The distribution of this property is a matter regulated by the internal laws of every State. Whatever is captured is, in intendment of law, captured by the State; bello parta cedant reipublicæ,[56] although the common law of England considers it otherwise.

XVI. The law of Postliminy is one of the few portions of the Roman Jus Fetiale which has descended to us. By this law, according as it is at present understood, if a vessel, even although it has been two or even four years in possession of the captors, be recaptured *before* condemnation, by a ship belonging to the country of the original owners, these may claim its restoration, on paying a proper salvage to those by whom the recapture has been effected.[57] The operation of this law, as far as concerns cases arising between her own subjects, or between her own subjects and those of such of her allies as evince a disposition to a reciprocal liberality, has been extended by Great Britain to any recaptures effected during the war, and without regard to any sentence of condemnation having passed.[58] The right of postliminy takes place only within territories of the captor's nation, or its allies, and does not include neutral countries.[59] It is, however, in reference to real property that an allusion to this law is chiefly necessary; and it is this law which avoids, on the return of peace, all alienations of such property, by a belligerent State, in occupation of the enemy's country. To impart stability to them, they must be confirmed by the treaty of peace.

XVII. The observance of good faith to an enemy is one of those duties on the obligation of which all jurists unite, and one which it is the obvious interest of all belligerents to practise.[60]

XVIII. In concluding this review of the laws of war, it is necessary [*45] to consider those relaxations of their rigor, which are familiar *to modern, and in some degree even to ancient practice. i. A truce is a suspension to hostilities, either for a long or an indefinite period, or sometimes only as to a portion of military operations. The authority to effect the former is not always implied in the authority of the commanders, but usually so as respects the latter. Whenever effected,

[53] 2 Wheat. 91-4. [54] 2 Ibid. 94.

[55] The Schooner Sophia, 6 Rob. 142. This was a case where a prize had been transferred to a neutral, and a peace was concluded, without a sentence of condemnation having been passed. The transfer was held valid.

[56] Martens, Précis, VIII. iii. 10.

[57] The Constant Mary, 3 Rob. 97, n. The Huldate, ibid. 235.

[58] 13 Geo. II. cap. iv.; 17 Geo. II. cap. xxxiv.; 19 Geo. II. cap. xxxiv.; 43 Geo. III. clx. The Santa Cruz, 1 Rob. 50. As to the salvage payable, Chitty, Law of Nations, 104-7. For the law of the United States, see 1 Kent, 112.

[59] 1 Kent, 109. [60] Grotius, De J. B. et P. III. xix.

a truce is obligatory on all the subjects of the belligerent States, after it has been duly promulgated. ii. The right to effect capitulations for the surrender of fortresses, &c., is involved in the authority committed to every commander by the term of his commission. iii. Passports, safe-conduct, and licenses, are granted in war, for the protection of persons and property.

XIX. *Licenses to trade*[61] are the most important of these. Grotius considers that the interpretation to be put on such permissions should be liberal rather than strict, *laxa quam stricta interpretatio admittenda est*,[62] but Sir William Scott adopted a different principle, and considering a license as a high act of sovereignty, and consequently *stricti juris*, concluded that it "must not be carried further than the intention of the great authority which grants it may be disposed to extend." It is not, however, "to be construed with pedantic accuracy," nor should "every small deviation be held to vitiate it. An excess in the *quantity* of goods permitted might not be considered as noxious to any extent; a variation in the *quality* or *substance* of the goods might be more significant, because a liberty assumed of importing one species of goods under a license granted to import another might lead to very dangerous abuses."[63] The time mentioned in the license, except from unavoidable circumstances, (The Æolus, 1 Dods. 302; Leevin v. Cormac, 4 Taunton, 483,) must not be exceeded,[64] and the port of shipment therein named is a material point.[65] A greater liberality of construction has been evinced by the courts, when the question has respected the parties for whose advantage the license has been obtained.[66] It has been decided that a general license is to be construed so far strictly as not to extend to a protection of an enemy's property,[67] but a license specifying any flag protects even an enemy's property.[68] The conditions contained in a license must, to render it valid, be truly and fairly performed;[69] and it is a permission which the war is considered to terminate.[70] In the first *instance it must be granted by competent authority,[71] circumstances [*46] sometimes forbidding property captured at sea to be sent into port. The captor, according to the general law of nations, may either destroy or permit the original owner to *ransom* it. The effect of a ransom is to give, on the authority of the State to which the captor belongs, a safe-conduct to the vessel captured, which will protect it from all cruisers of that State. By the 22 Geo. III., c. 25, British subjects are prohibited from ransoming enemy's property.

[61] Some observations upon Licences will be found in a supplementary note, p. 71, post. [62] Grotius, De J. B. et P. III. xxi. 14.

[63] The Cosmopolite, 4 Rob. 8; but when the interests of insurers are involved, our municipal courts are disposed to construe with liberality licenses to trade with the enemy. Flindt v. Scott, 5 Taunt. 674. [64] The Cosmopolite, sup. cit.

[65] The Twee Gebroeders, ut cit.

[66] Defflis v. Parry, 3 Bos. & Puller, 3; Timson v. Merac, 9 East, 35; Rawlinson v. Janson, 12 East, 223; sed contra; The Jonge Johannes, 4 Rob. 263; The Aurora, ibid. 218. [67] The Josephine, 1 Act. 313. [68] The Hendrick, 1 Act. 322.

[69] Vandych v. Whitmore, 1 East, 475, see also 12 East, 302.

[70] The Planters' Wensch, 5 Rob. 22.

[71] The Hope, 1 Dods. 226.

XX. We have now to discuss the rights of war as concerns neutral nations. Properly "neutral nations are those who in time of war do not take any part in the contest, but remain common friends to both parties, without favoring the arms of the one to the prejudice of the other."[72] To be neutral, the nation should give no assistance when she is under no obligation to give it. In whatever does not relate to war, she is not on account of his present quarrel to deny to any of the parties what she grants to the other. The Eliza Ann, 1 Dods. 245. Such conduct is the very essence of neutrality, and a nation forfeits her neutral character when she departs from it. It does not necessarily, however, preclude her, if so bound by treaty previous to the war, furnishing a belligerent party with a limited succor in money, troops, ships, or munition, or from opening her ports to receive his prizes. From such an obligation she is said to be released if her ally be the aggressor in the war. Bynk. Q. P. J., I. ix. Hostilities cannot lawfully be exercised within the territories of a neutral State, the common friend of both parties. Nor can such neutral State permit, to one or certain of the belligerent parties, the passage of their armaments through her dominions, unless she is prepared to concede a like indulgence to the opponents. Such a preference would destroy her neutrality.

XXI. A neutral territory must not be violated for the purposes of war. (The Twee Gebroeders, 3 Rob. 165.) No capture effected within its limits, which are considered as stretching seawards one mile from the mainland (The Eliza Ann, ut cit., but see R. v. Forty-nine Casks of Brandy, 3 Hagg. 289), is lawful; and when illegally made, the neutral State is bound to restore it to its original owners. Nor can such capture be lawful when made by a vessel hovering at the mouth of the river, or bays, or round the coast of a neutral. Bynkershock (I. viii.) has excepted from this rule a vessel chased within a neutral jurisdiction, whither, he thinks, the belligerent may follow and capture her; but this doctrine, though it has not wanted supporters, is now generally disowned. The Vrow Anna Catherine, 5 Rob. 15, 161–373.

[*47] *XXII. The restitution of property, illegally captured within neutral limits, is effected by an application to the captor's Government, by the neutral State, as it is her rights which the law considers to have been violated, and the hostile claimant has no right to appear for the purpose of suggesting the validity of the capture.

XXIII. A belligerent cruiser innocently passing through a neutral jurisdiction is not considered to have violated its rights, so far as to invalidate a subsequent capture; and a neutral is not compelled, in virtue of his neutrality, to deny such a passage, nor even to refuse to a belligerent vessel pursued, refuge in its harbors; but it ought not to permit it to lie there, and await a favorable opportunity of renewing a conflict. It need not deny to such vessels provisions and refreshments, which the law of nations universally tolerates; but no proximate acts of war are in any manner to be allowed to originate on neutral ground. The Anna, 5 Rob. 573. For this reason, when belligerent vessels meet in a neutral port,

[72] Vattel, III. vii. 103. The Rendsborg, 4 Rob. 126.

or one pursues the other there, hostilities cannot be permitted between them during their tarrying; but should one sail, the other must not follow for twenty hours; such at least is the opinion of Professor Martens.—Précis, VIII. vi. 6.

XXIV. A neutral State that permits the arming and equipment of ships or troops for the purposes of a war within its territory violates its neutrality;[73] but it is no breach of neutrality to suffer a belligerent to bring in his prizes for the purposes of sale.[74]

XXV. It may be here remarked that, if a neutral acquiesces in an outrage inflicted on him by one belligerent, the other has a right to retaliate; and that if a deed interdicting a neutral from trading with us, or visiting our ports, is executed upon him, it is an interdiction he has no right to submit to, because his submission will be our injury. If his submission is the result of favor to the belligerent, the neutral becomes constructively a party to the war, and his neutral character with its consequent immunities terminates forthwith. If, on the other hand, it originates in his weakness and inability to resist, we may insist, for our own protection, and without denying to him his neutral character, that what he has suffered from our enemy he may suffer from us, otherwise he would be keeping an open trade with the enemy to our disparagement, and becoming an instrument of its illegal pressure on our resources.[75]

XXVI. As to the commerce of neutrals, it has been decided,[76] that not only has a neutral a right to pursue his general commerce with the enemy, but even to act as the carrier of the enemy's goods, from the enemy's country to his own, without being subject to the confiscation of the ship, or of any *neutral* goods on board. This is a right which [*48]
*was formerly disputed, but which is now universally recognized; and the neutral owner, when the enemy's goods on board his ship have been seized, is considered entitled, provided his conduct has been fair, to his reasonable demurrage, and his claim for freight.[77]

XXVII. That a belligerent is entitled to seize an enemy's goods on board a neutral vessel is an undoubted principle;[78] if, however, it should

[73] This is forbidden in Great Britain by the Foreign Enlistment Act, 59 Geo. III. cap. 69. [74] 2 Wheat. 148-9. [75] Chitty, Law of Nations, 151-2.

[76] Barker v. Blakes, 9 East, 283.

[77] Vattel, III. vii. 115; 1 Kent, Comm. 125; 2 Wheat. 160-1; The Twilling Riget, 5 Rob. Rep. 82.

[78] Grotius, De J. B. et P. III. vi. 6. The papers usually expected to be found on board a neutral vessel are, i. The Passport, Sea Brief, or Sea Letter, a permission from the neutral State to the master to proceed on the voyage, and indispensable to the safety of every neutral ship. ii. The Proofs of Property to show the ship really belongs to neutrals. iii. The Muster Roll, which indicates inter alia the nationality of the crew, as it is suspicious if a majority of them are foreigners, still more, if natives of the enemy's country. iv. Charter Party. v. The Bills of Lading. vi. The Invoices, which should show by whom the goods were shipped and to whom consigned. vii. The Log Book. viii. The Bill of Health.—Marshall on Ins. I. ix. 6. The contrary maxim to that in the text, le pavillon neutre couvre la mechandise, was never heard of until, at the desire of Frederick the Great, M. Michel, the Prussian Minister, in 1752, addressed the memorial, already referred to (and for which see Appendix,) to the Duke of Newcastle, which elicited the celebrated reply of the English jurists, styled by Montesquieu (Lettres Persannes, xlv.), a "response sans replique." The doctrines of these latter were ably vindicated by Mr. Pitt, in his speech on the State of the Nation in 1801, and by

appear that the enemy's interest in the goods was only partial, or that they were the joint property of an enemy and a neutral, the share of the neutral will be saved harmless, and that of the enemy alone confiscated.[79] It has been, however, frequent in commercial treaties, to stipulate[80] that free ships shall make free goods, and thus this principle, like many other principles of international law, as we have frequently had occasion to observe, has been modified by convention.

XXVIII. The effects of neutrals on board enemies' ships are, upon general principles, considered as exempt from confiscation.[81]

XXIX. The freedom of commerce to which neutral States are entitled [*49] does not extend to *contraband of war*, such as warlike stores *and other articles directly auxiliary to warlike purposes.[82] "The catalogue of contrabands," says Sir William Scott, "has varied very much, and sometimes in such a manner as to make it very difficult to assign the reason of the variations, owing to particular circumstances, which have not accompanied the history of the decisions."[83] Grotius distinguishes between those articles which are useful only for the purposes of war, those which are not so, and those of indiscriminate use in war and peace. With other writers, he agrees in prohibiting to neutrals the carrying of the first to the enemy; the second he permits: the third he sometimes permits, and sometimes forbids. Bynkershoek[84] considers that the third ought, under no circumstances, to be considered contraband, and the whole question is involved in much confusion.[85]

XXX. The penalty of confiscation for engaging in a contraband trade is not held generally to attach, if the goods are not taken in delicto, and in the actual prosecution of the voyage;[86] but a different rule is held to apply to cases of contraband carried from Europe to India, with false papers and false destination intended to conceal the real object of the expedition, where the return cargo, the proceeds of the outward cargo taken on the return voyage, was held liable to condemnation.[87]

XXXI. The *rule of the war* of 1756, as it has been called, has formed so frequently a subject of controversy amongst publicists that it cannot be

Lord Liverpool, in an admirable work he put forth upon the subject. They accord with the principles laid down in the Consolato del Mare, and in the writings of Bynkershoek, Vattel, Voet, Zuarias, Loccenius, and Abreu; and it was in the last degree unbecoming the fidelity of an historian and the dignity of a statesman for M. Thiers to have observed, as he has done, upon the subject.—Hist. du Consul. et de l' Empire, chap. ix. The old French law, as respected neutrals, was much more severe, inasmuch as it admitted eight causes for confiscating vessels, only one of which will avail in English prize courts. See a useful note on the subject. —For. Quart. Rev. xxxv. 145. If we are to believe Sir Jas. Marriott, the resistance Prussia offered to the indisputable principle on behalf of which Great Britain contended was due, in some degree, to a sarcasm of Lord Grenville, who declared that he had never heard of the flag of Berlin, and should soon expect to hear of the flag of Frankfort.

[79] The Franklin, 6 Rob. 127; The Zulerna, 1 Act. 14.

[80] This stipulation does not import the converse of the proposition, namely, that enemy's ships make enemy's goods. The Nereide, 9 Cranch, Amer. Rep. 388.

[81] 2 Wheat. 162; 1 Kent, 138.

[82] Grotius, De J. B., et P. III. i. 15. [83] The Jonge Margaretha, 1 Rob. 189.

[84] Quest. Jur. Pub. I. ix. 10.

[85] See Supplementary Essay II. on the Law of Contraband, p. 61, post.

[86] The Imina, 3 Rob. Rep. 168. [87] The Rosalie and Betty, 2 Rob. 343.

passed over without remark. The superiority of Britain as a naval power was conclusively established by the war with France in 1756, when the communication of this latter country with her out-lying possessions was effectually interrupted by our fleet. In order to avert the disastrous consequences with which the French colonies were threatened, their Government permitted a neutral power, the Dutch, to carry on the trade, the advantages of which had previously been enjoyed by the French marine exclusively. Some of these Dutch vessels, having been captured, were condemned on the principle stated by the Lords of Appeal in the case of The Wilhelmina.[88] "By the general law of nations, it is not competent to neutrals to assume in time of war a trade with the colony of the enemy which was not permitted in the time of peace,"[89] a principle applying equally to all species of trade, whether coasting or colonial. It is considered to be relaxed, i. When the neutral brings the cargo to her own country.—The Providentia, 2 Rob. 138, 142–197; or ii. To a neutral colony in the neighborhood of that where the shipment was made.—The Hector, Edw. 379; but iii. Not to a neutral port elsewhere. —*The Lucy, 4 Rob. 14. iv. Whilst the general principle is not applied to East India Colonies so strictly as to others.—The Juliana, Rob. 328. [*50]

XXXII. "The law of blockade," says Bynkershoek,[90] "is founded on the principles of natural reason as well as on the usage of nations. In order that this law may apply, (1.) There must be an actual blockade in existence."[91] The mere declaration of a blockade will not suffice. An adequate naval force must be stationed at the blockaded port; and properly "that denomination is given only where there is, by the power which attacks it by ships stationary or sufficiently near, an evident danger in entering."[92] An accidental absence of the blockaking squadron, provided the blockade is speedily renewed, forms an exception to the rule, and an attempt to take advantage of the absence to break the blockade is considered fraudulent.[93]

XXXIII. (2.) The neutral must have had notice of the existence of the blockade. It is usually notified to all neutral Governments, and "it is the duty of foreign [neutral] governments to communicate the information to their subjects, whose interest they are bound to protect. I shall hold therefore, that a neutral master can never be heard to aver against a notification of blockade that he is ignorant of it."[94] This is a case where the blockade has been notified to the Government; but if the individual is personally informed of it, the consequences are the same.

XXXIV. To enter or quit a blockaded port with a cargo laden after the commencement of the blockade is punished with confiscation of the ship and cargo, and the offence is not considered discharged until the end of the voyage.[95]

[88] 4 Rob. App. 4.
[89] On this subject, see 2 Wheat. 225-8. Chitty, Law of Nations, 153-83.
[90] Quest. Jur. Pub. I. iv. 11. [91] The Betsey, 1 Rob. 93.
[92] Convention of 1801 between Great Britain and Russia, art. iii. sec. 4.
[93] The Columbia, 1 Rob. 154. The Hoffnung, 6 Rob. 116.
[94] Per Sir W. Scott, The Neptunus, 2 Rob. 112.
[95] See Supplementary Essay I. on the Law of Blockade, p. 55, post.

XXXV. The right of *visiting* and *searching* merchant ships upon the high seas, whatever their cargo and whatever their destination, for the purpose of seeing what the ships and their destination are, and whether or not they are employed in the enemy's service (Le Louis, 2 Dods 244–253,) is an incontestible right of the lawfully commissioned cruisers of a belligerent State, nor can even the command of a neutral sovereign justify his subjects in forcibly resisting its exercise. (The Maria, 1 Rob. 360.) Such resistance is punishable by the condemnation of the ship (The St. Juan Baptista and La Purissima Conception, 5 Rob. 33) and cargo, and a simple intention to resist will involve the same consequences (The Maria, ut cit.,) but such an intention will not be presumed from a mere [*51] attempt to escape a cruiser before possession has been *had, &c. (The St. Juan, &c., ut cit.) It is understood, also, that the forcible resistance of an enemy master will not, in general, affect neutral property laden on board of an enemy's ship.[96]

We may notice that the English Court of Admiralty held a neutral to have no right to charter and lade his goods on board a belligerent armed merchant ship, without forfeiting his neutrality;[97] but this is a doctrine which the American Courts have refused to sanction, (2 Wheat. 25.) How far neutral vessels under an enemy's convoy are subject to capture is still a moot point.

This may be accepted as a statement of those principles to which the Law of Nations is susceptible of being reduced. The plan of this work forbids my entering into details, the discussion of which would have involved me in controversies rather of fact than of law; my object will have been completely answered if the preceding pages should furnish those anxious to engage themselves in such controversies with references to such authorities as may conduct them to a fortunate result. I am sorry but not afraid to say, however, that England in her external policy has not yet recognized—practically I mean—the full influence of that noblest of all positive systems of law—THE LAW OF NATIONS—a system, in the exposition and interpretation of which her tribunals have acquired a universal reputation, and their decisions an authority of judicial weight in the regards of foreign judicatories.

[96] The Catharine Elizabeth, 5 Rob. 232. [97] The Fanny, 1 Dods. 443.

SUPPLEMENTARY ESSAYS.

*I.—LAW OF BLOCKADE. [*55]

I. A BLOCKADE, being a high act of sovereign authority,[1] (The Henrick and Maria, 1 Rob. 148,) the right of blockade is a severe right, a severe right to be construed strictly,[2] not extended by implication,[3] (The Juffrow Maria, 3 Rob. 154,) and a belligerent right not to be exercised for mere profit or convenience, *e. g.*, to obtain a commercial monopoly, &c. (The Fox, Edw. 320.)

II. There are two sorts of blockade, (i.) that by the simple fact only, and (ii.) that by a notification accompanied with the fact. The Neptunus, 1 Rob. 171, ib. 86.)

(i.) In every instance, the blockade must be a blockade in fact, *i. e.*, maintained by a force adequate to prevent the ingress and egress of vessels, (The Nancy, 1 Act. 57,) and a mere declaration of blockade will of itself avail nothing.[4] (The Betsey, 1 Rob. 93.) Under some circumstances, a single ship, and that even if, at the time, assisting in the blockade of another port, (The Nancy, ut cit.) or stationed only in the neighborhood, will be considered as a force adequate to the constitution of a blockade (The Arthur, 1 Dods. 423,) and this also may be the case with a squadron at some distance from the port, provided the distance be not too great to prevent the ships acting upon the commerce of the port. (Naylor v. Taylor, M. & M. 205.) The *extent*[5] of a blockade is limited by the capacity of the force blockading, such points being exempt from the blockade which the power of the blockaders is incompetent to reach. (The Ocean, 5 Rob. 91. The Stert, 4 ib. 66.) On the other hand, at times, a blockade, from the necessity of the case, operates beyond the intention and purposes of the blockaders, *e. g.*, a blockade of the Elbe, which prejudices the commerce of the neutral as well as the

[1] It is however, competent to a commander going to distant ports to declare a blockade. The Rolla, 6 Rob. 364.

[2] The evidence as to the *existence* of a blockade must be clear and precise. The Betsey, ut cit.

[3] The fact that the continuance of a blockade is dubious will, *under some circumstances* avail in obtaining the restitution of a captured vessel. See The Triheten, 6 Rob. 65.

[4] Thus the commencement of a blockade dates from the assembling of the blockading squadron, and not from the transmission of the summons to surrender. The Naples, 2 Dods. 284.

[5] On the subject of the *extent* of a blockade, see The Frau Ilsabe, 4 Rob. 63. The Luna, 1 Edw. 190.

[*56] enemy's ports in that river, *but in such case especial indulgence is invariably shown to the former, when they come under the adjudication of prize tribunals. (The Spes and The Irene, 5 Rob. 76.)

(ii.) A public notification of the existence of a blockade, although usual, is not absolutely necessary to justify the capture of a vessel seeking a blockaded port (The Mercurius, 1 Rob. 82;) vessels *quitting* such a port are always presumed cognizant of the blockade (The Vrow Judeth, 1 Rob. 152.) It will suffice if notice be given on the spot, and even that is unnecessary if it can be shown that the master was aware of the blockade (The Columbia, 1 Rob. 156,) which he is supposed to be if the blockade had for some time been notified, although perhaps, not to his own Government (The Adelaide, 2 Rob. 111, *n*,) or, if the fact of its existence was generally notorious. (The Tutela, 6 Rob. 177.) Although such a presumption will at times furnish a prima facie case against the master (The Hurtige Hane, 2 Rob. 128,) still the Court will not consider the *belief* of the captor that the blockade was notorious as *sufficient of itself* to raise it. (The Betsey, ut cit.) Where due notification has been given to the master's Government, *he* is not suffered to allege his own ignorance[6] as an excuse for his violating or attempting to violate the blockade (The Neptunus, ut cit., 2 Rob. 130; Medeiros v. Hill, 8 Bing. 231,) a principle, the severity of which has been somewhat relaxed by our Common Law Courts in favor of commerce and especially of insurers. Park on Ins. 177; Dagleish v. Hodgson, 7 Bing. 495. Naylor v. Taylor, ut cit. Even when the notification has been made through the enemy's government, it is not invariably considered invalid. (The Rolla, ut cit.) It is as well to state, that it is above all these things necessary that the notification should, in its terms,[7] be explicit, and indicate with accuracy the precise limits and extent of the blockade, *e. g.*, it has been held that the notice of a blockade of the Dutch coast, which does not exist as a fact, is not a good notice of an existing blockade of Amsterdam. (The Henrick and Maria, ut cit.) There is this distinction between a blockade merely de facto, and a blockade notified, that, in the latter case, the bare act of sailing to a blockaded port is a breach of the blockade (The Neptunus, ut cit.,) but this is a "strict rule" not to be applied too strictly,—a summum jus, that is not adhered to with undeviating rigor (ib. The Vrow Johanna, 2 Rob. 109.) It is *not* applied when it can be proved that there was no premeditated intention of violating the blockade on the arrival of the ship,[8] (Madeiros v. Hill, ut cit.,) *and perhaps it has been laid down in the books more broadly [*57] and positively than consists with the spirit that would be found to govern international tribunals, if another general war should set them in motion. An American (U. S.) ship from Philadelphia, with a contin-

[6] It is otherwise in the case of a blockade de facto.

[7] Objection to terms of a notification overruled, The Rolla, ut cit.

[8] This rule in its severity was not applied usually to American ships, the distance of their country precluding them from obtaining early intelligence as to the continuance or removal of blockades in Europe. The Betsey, ut cit. But those were days when Atlantic steam navigation was unknown.

gent destination to Bremen, if not blockaded, was captured during her voyage, under the plea that the blockade of Bremen was known in the United States when the vessel sailed, and that her papers did not clearly disclose the place where the inquiry was to be made, as to the continuance of the blockade. Restitution of the ship was decreed, and the captors condemned in costs, the Lords of Appeal considering, with the British High Court of Admiralty, that Heligoland being the place where pilots for Bremen were always taken in to save insurance, it must be assumed to be the place where the inquiry was purposed to have been made. (The Dispatch, 1 Act. 163.) *European*[9] vessels, sailing with a knowledge of a blockade, will not be permitted, even although the owners should so direct (The Spes and Irene, ut cit.,) to proceed to a blockaded port under pretence of learning whether the blockade continued or not; (The Posten, n. to The Betsey, ut cit.,) the proper place for the inquiry being some port on the way, or in the blockading country. (The Betsey, ut cit.) The rule is, however, subject to some important modification, when circumstances require it, and the bona fides of the transaction is made apparent. (The Little William, 1 Act. 141.) A reasonable time is also suffered to elapse after the notification has been given, before its consequences are considered to attach. Upon this point nothing certain can be laid down; the determination of each case must be governed by its own circumstances. (See the decisions, 1 Rob. 91–334, 2 ib. 131–298, 3 ib. 283–6.)

III. A blockade having been established, the *ingress* and *egress* of vessels are acts treated as breaches of it—for the destruction of the enemy's commerce is the very object the blockaders have in view. The legal presumption is, that a vessel entering a port does so for the purpose of disposing of her cargo, and that presumption[10] is not removed by her returning with it on board (The Charlotta, Edw. 252, and see The Alexander, 4 Rob. 93.) INGRESS is not permitted even to a vessel in ballast (The Comet, Edw. 32,) and this although her object be to bring away property which, originally the enemy's, had become that of a neutral before the blockade began. (ib.) The ingress may be *constructive*, as when a vessel enters the roadstead under shelter of the enemy's *batteries where large ships are usually unladen by lighters (The Neutralitet, 6 Rob. 34;) *or* when she sails with a proved intention of breaking the blockade (The Columbia, 1 Rob. 156;) *or* approaches the blockading squadron within reach of capture, under circumstances that should have provoked the inquiry whether or not the squadron was at the time blockading (Naylor v. Taylor, ut cit.;) *or* is found in a course inconsistent with her averred destination (The Mentor, Edw. 207;) *or* under other circumstances inviting the suspicion her des- [*58]

[9] A vessel sailing after notification encounters a belligerent frigate on her voyage to the blockaded port, and is informed that the port was not blockaded. Held that although the vessel was liable to capture up to the time it met with the frigate, it was not afterwards, because it had been misinformed. The Neptunus, ut cit.

[10] Sometimes mala fides is practically presumed, even although it is certain it does not exist. 1 Rob. 147, and see The Adonis, 5 Rob. 256, and The Shepherdess, ib. 262.

tination is illegal (The James Cook, Edw. 261;) *or* approaching the blockaded port so that she might slip it unobserved (The Neutralitet, ut cit.;) *or* when she exposes the blockaders to the enemy's fire, although only to obtain a pilot for an innocent port (The Charlotte, &c., 6 Rob. 101–182; 30 Edw. 202;) or when she carries away cargo that had been brought out to her by lighters through the mouth of a blockaded river (The Maria, 6 Rob. 201, 204, 394.) It is *no breach* of a blockade the sending of goods into a port with a view of transporting them overland to a blockaded port[11] (The Jonge Pieter, 4 Rob. 79;) *nor* the passing through a canal linking two seas and traversing a blockaded territory, with the mere object of shortening a voyage (The Julia, 1 Dods. 169, n.;) *nor* are goods condemnable, as for breach of blockade, brought overland on neutral account from a blockaded to a non-blockaded port. (The Ocean, ut cit. and n.)

EGRESS from a blockaded port is prima facie breach of the blockade (The Frederick Molke, 1 Rob. 88,) but it is *no breach* (1) if the cargo, *before* the commencement of the blockade, have been bona fide purchased, paid for, and shipped or delivered for that purpose on board *lighters*, but not if kept in *warehouses* (The Rolla, ut cit.;) (2) or if the cargo having been sent in before the blockade, be withdrawn by the owner (The Juffrow Maria, 3 Rob. ut cit.;) (3) or if the ship, having entered before, &c., retires in ballast (The Juno, 2 Rob. 119;) (4) or if she have been chartered by the minister of a neutral country to remove home distressed seamen of that country[12] (The Rose in Bloom, 1 Dods. 58.) It is breach of blockade if after notification given, a neutral in a blockaded port continues embarking a cargo (The Calypso, 2 Rob. 298, and The Betsey, ut cit.;) or if, having gone in voluntarily, he therein sells, even by compulsion, his cargo (The Byfield, Edw. 188,) or therein purchases (no matter out of what funds) an enemy's vessel[13] (The General Hamilton, 6 Rob. 61,) unless it *had been originally the property of the purchaser, when the court is disposed to regard the transaction in the light of a ransom or compromise. (The Rose in Bloom, 1 Dods. 57.)

[*59]

IV. It must be remarked that an absolute and unavoidable necessity, in the nature of an imperative overruling compulsion, will *excuse* a breach of blockade (The Hurtige Hane, 2 Rob. 124,) e. g., entering a blockaded port in stress of weather (The Fortuna, 5 Rob. 27; The Charlotta, Edw. 252,) but ample proof of the necessity must be given (The Christiansberg, 6 Rob. 378; The Elizabeth, Edw. 198,) and want of provision is an excuse scarcely ever admissible (The Fortuna, ut cit.) It is *no excuse* in breach of

[11] The rule applies vice versa, in cases where goods are sent by interior communication from a blockaded to a non-blockaded port for shipment to the blockader's country. The Stert, ut cit.

[12] But the vessel carrying in addition a cargo, both ship and cargo condemned, except as to certain stores for the use of the distressed seamen.

[13] A ship coming out in ballast, having while in the blockaded port, been transferred from one neutral to another, is no breach of blockade, nor is the transfer illegal (The Potsdam, ut cit.,) but it is otherwise if the ship has been purchased by the neutral seller of the enemy since the commencement of hostilities. The Vigilentia, 6 Rob. 122.

blockade by egress that the cargo is intended for the blockader's country (The Byfield, Edw. 189), or that there was reason to fear, unless brought away, it would be seized by the enemy (The Wasser Hundt, 1 Dods. 271, n.); but it *is an excuse* for a ship, coming out with a cargo, that there were apprehensions of a war between its country and the enemy, and that the enemy's regulations prevented it coming out in ballast. (The Drie Vrienden, 1 Dods. 269.)

V. A blockade is sometimes *relaxed* in favor of certain flags, but care must be taken strictly to observe the conditions annexed to such a relaxation (see on this head The Success, 1 Dods. 131; The Sophia Elizabeth, 1 Act. 46; The Charlotte Sophia and the Klein Jurgen, ib. 56). The *relaxation* may also arise from the *permission of the blockaders* (for an instance see The Courier, Edw. 249); or by their *remissness*, for when ships have been suffered to enter the blockaded port *they* cannot be condemned on their egress, though their *cargoes* will (The Juffrow Maria and other cases, 3 Rob. 147, 158, 159); or by *license*, (on the interpretation of which see the Byfield and The Juno, ut cit.)

VI. The sanctions of the Law of Blockade are the seizure and condemnation of the offending ship and cargo, either or both. In order that the cargo should be affected by the conduct of the vessel, it must be shown that the owners of the cargo were aware of the blockade before they laded (The Mercurius, 1 Rob. 84), unless, indeed, they intrusted the ship's master with discretionary powers as to destination, and he knowingly violated the blockade (The Columbia, ib. 156), or unless, being also owners of the ship, they have consigned the ship to his order, and he has purchased the cargo, or a portion of it, for their account, in which latter case the cargo or their portion of it, is condemnable (The Mentor, 1 Act. 60). As a general principle, owners of cargo are liable for the acts of those they employ (The James Cook, *Edw. 263); but if a master, through perversity, forces a blockade, the cargo if it have been shipped in [*60] ignorance of the blockade, will not be condemned (The Adonis, 5 Rob. 256), nor will it be if embarked in a blockaded port by agents whose principals were ignorant that the blockade existed (The Neptunus, ut cit.; The Adelaide, 3 Rob. 281). The cargo, however, will be condemned, and *not the ship*, when the latter, suffered by the remissness of the blockaders to enter the port, is captured on her return. The Juffrow Maria, ut cit.)

VII. Capture may be effected (1) when the master, after being warned, expresses or exhibits an intention of going in (The Apollo, 5 Rob. 286), (2) at any period of the same voyage as that in which breach of blockade has been committed (Welvaart van Pillaw, 2 Rob. 128; 3 ib. 153), (3) even although, on her way home, the vessel puts into an intermediate port (The General Hamilton, ut cit.) (4) provided, at least, the blockade subsists at the time of the capture (The Lisette, 6 Rob. 387). A ship suffered to quit a blockaded port by the blockakers, on condition she should proceed to a neutral port, cannot, although, in breach of such condition, she proceeds to an enemy's port, be lawfully captured, until she have left such port, and then only during her next subsequent voyage. (The Christiansberg, 6 Rob. 376; ib. 382, n.) A vessel having been impro-

perly permitted by one captor, ignorant of the law, to proceed on her voyage, is not thereby exempted from liability to future capture, as it will be presumed that she, at least, was aware her own conduct was illegal (The Comet, Edw. 34.)

VIII. A blockade may be wholly terminated (1) by the voluntary withdrawal of the blockading force, the presumption being, however, that if a blockade be by notification, it continues until that notification shall have been publicly withdrawn (The Vrow Johanna, 2 Rob. 109; The Neptunus, ut cit.); or (2) by the blockading force being beaten off or retiring before the enemy (The Hoffnung, 6 Rob. 116); or (3) by permission of ingress and egress given by the blockaders to unprivileged vessels (The Fox, &c., Edw. 320.) But a blockade is not terminated because the blockading squadron is driven off by accident, shifting (1 Rob. 171), or adverse winds, the suspension and its cause being known (The Frederick Molke, 1 Rob. 87, and see ib. 156); or by its temporary absence, being engaged in chasing suspicious vessels in its neighborhood (The Eagle, 1 Act. 65), provided it does not proceed to an improper distance (La Melanie, 3 Dods. 130), i.e. a distance forbidding its maintaining practically the blockade. Under some circumstances, a blockade, which has been temporarily raised, may be resumed without the necessity of a fresh notification to affect neutral commerce. (The Hare, 2 Dods. 471; see also The Hoffnung, ut cit.)

[*61] *II.—THE LAW OF CONTRABAND.

Some difficulty having been experienced in determining what articles are and what are not properly to be considered contraband, a few remarks on the subject will perhaps be desirable.

In a treaty between France and the United States of America (Paris, February 9, 1778), a catalogue of contraband articles was incorporated, which, as showing the spirit that usually dictates conventional arrangements of this kind, may reasonably find a place here:—

"Sous ce nom de contrebande ou de marchandises prohibées, doivent être compris les armes, canons, bombes avec leur fusées et autres choses y relatives, boulets, poudre à tirer, mêches, piques, épées, lances, dards, hallebardes, mortiers, pétards, grenades, salpêtre, fusils, balles, boucliers, casques, cuirasses, cotes-de-mailles et autres armes de cette espèce, propres à armer des soldats, portemusquetons, baudriers, chevaux avec leur équipages et tous autres instrumens de guerre quelconques; les marchandises denomées ci après, ne seront pas comprises parmi la contre-bande ou choses prohibées savoir: toutes sortes de draps et toutes autres étoffes de laine, lin, soie, coton ou d'autres matiéres quelconques, toutes sortes de vêtemes avec les étoffes dont on a contume de les faire, l'or ou l'argent monnaié ou non, l'etain, le fer, laiton, cuivre, airain, charbon, de même que le froment et l'orge, et tout autre sorte de blés et légumes, le tabec et toutes les sortes d'epiceries, la viande salée et fumée, poisson salé, fromage

et beurre, bierre, huiles, vins, sucre et toute espèce de sel et en général toutes provisions servant pour la nourriture de l'homme, et pour le soutien de la vie ; plus toutes sortes de coton, de chanvre, lin, goudron, poix, cordes, cables, voiles, toiles à voiles, ancres, parties d'ancres, mâts planches madriers et bois de toute espèce et toutes autres choses propres à la construction et réparation des vaisseaux, et autrestmatières quelconques qui n'ont pas la forme d'un instrument préparé pour la guerre, par terre comme par terre comme par mer, ne seront pas réputées contrabande, et encore moins celles qui sont déjà préparées pour quelqu'autre usage : toutes las choses dénommées ci-dessus devoient être compris parmi les marchandises libres."[1] The list of contraband was afterwards enlarged (12 Vent. An. 5), and made to include "des bois de construction : les brais, goudrons et résines : *le cuivres en feuilles ; les voiles, chanvres et cordages ; et tout ce qui sert directement ou indirectement [*62] à l'armement et à l'équipement des vaisseaux, excepté le fer brut et le sapin en planches." This modification of the treaty of 1778 was effected by France in consequence of the 18th article of the Treaty of London (November 19, 1794) between Great Britain and the United States, in which the catalogue of contraband goods is very comprehensive.[2]

Nowhere do we find the principles of the law of contraband more ably stated than in a judgment of Sir William Scott.[3] "In 1673," he says, "when many unwarrantable rules were laid down by public authority respecting contraband, it was expressly asserted by a person of great knowledge and experience in the English Admiralty that by its practice, corn, wine, and oil were liable to be deemed contraband. In much later times, many sorts of provisions, such as butter, salted fish, and silk have been condemned as contraband. The modern established rule was, that generally they are not contraband, but many become so under circumstances arising out of the peculiar situation of the war, or the condition of the parties engaged in it. Among the causes which tend to prevent provisions from being treated as contraband, one is that they are of the growth of the country which exports them. Another circumstance to which some indulgence by the practice of nations is shown, is when the articles are in their native and unmanufactured state. Thus iron is treated with indulgence, though anchors and other instruments fabricated out of it are directly contraband. Hemp is more favorably considered than cordage. Wheat is not considered so noxious a commodity as any final preparation of it for human use. But the most important distinction is, whether the articles are destined for the ordinary use of life or for military use. If a port is a general commercial port, it shall be understood that the articles were going for civil use, although occasionally a frigate or other ships of war may be constructed at that port. On the contrary, if the great predominate character of a port be that of a port of naval equipment it shall be intended that the articles were going for military use, although merchant ships resort to the same place. It is the usus bellici which determine an article to be contraband."

In illustration of these doctrines, the following cases are important :—

I. *Ships of War.*—It having been clearly ascertained that a ship is,

[1] Guichard, Code des Prises, i. 242. Guichard, ii. 283—284.

[3] The Jonge Margaretha, 1 Rob. 189.

in truth a ship of war, and that it is destined to an enemy's port there to be sold, there can be no question but that it is contraband (The Richmond, 5 Rob. 336).

II. *Sail Cloth* is under all circumstances esteemed contraband.

[*63] *III. *Pitch and Tar.*—Pitch and tar, which are not the produce of the country exporting (The Twee Juffrowen, 4 Rob. 242), or which it is shown *could not* be so (The Jonge Tobias, 1 Rob. 329), are contraband; but, in derogation of the authority of the old and severer rule, it has been held that pitch and tar, being Swedish property, and conveyed in Swedish vessels, are not subject to confiscation, but simply to the rights of pre-occupancy and pre-emption (The Maria, 1 Rob. 372; The Christina Maria, 4 Rob. 166; The Sarah Christina, 1 ib. 241). On this subject see further The Charlotte, 1 Act. 201, and the Neptunus, 6 Rob. 403.

IV. *Hemp* of an inferior quality, not fit for naval purposes (The Gute Gesellschaft Michael, 4 Rob. 94), or which is the produce of the exporting country and embarked in its vessels (The Apollo, 4 Rob. 158), is not considered contraband, but the onus of proving its origin lies with the claimant (The Evert, ib. 354).

V. *Timber* for the purposes of *ship building*, within which term *masts* are included (The Staadt Embden, 1 Rob. 29), proceeding to an enemy's port (it being a port of naval equipment) is decidedly contraband (The Endraught, 1 Rob. 25). See also the Twende Brodre, 4 Rob. 33, and The Charlotte, 5 Rob. 305.

VI. *Rosin* is contraband if destined for a military port of the enemy (The Nostra Signora De Begona, 5 Rob. 97).

VII. *Brimstone* also, under some circumstances, will be ruled contraband (The Ship Carpenter, 2 Act. 11).

VIII. *Tallow* will become contraband if destined to a port merely of naval equipment, but not so if the port possess also an extensive trade and mercantile character (The Neptunus, ut cit).

IX. *Wines* being taken to a naval port of the enemy (Brest), at the time a large fleet lay there, was adjudged contraband (The Edward, 4 Rob. 68).

X. *Cheeses* of the kind usually furnished as naval stores, going to a naval port of the enemy, condemned as contraband (The Zelden Rust, 6 Rob. 93), but opportunity given of showing the destination was otherwise than was presumed (The Frau Margaretha, 6 Rob. 92).

XII. *Despatches.*—To convey to the enemy's possession an official communication of an official person in the service of the enemy, no matter what degree of importance may belong to the communication, is an act that will expose the neutral carrier to the consequences of engaging in a contraband trade (The Caroline, 6 Rob. 465), although if the owner of the cargo, at the time of the shipment, be ignorant the ship is about to engage in such an undertaking, the cargo will be saved harmless (The Susan, 6 Rob. 461–2). On general principles, however, the *master* is not excused by his plea of ignorance (ib.) To carry despatches from the enemy to his ambassador (The Caroline, ut cit.), or to his consul in a neutral country, is no ground for condemnation (The Madison, Edw. 224).

*XIII. *Carrying Military Persons* subjects the vessel to confiscation. (See The Friendship, 6 Rob. 420, and The Orozembo, ib. 430.) [*64]

As to the penalty attaching to contraband—it involves in confiscation as much of the cargo as is contraband, and even as much that is innocent as belongs to the owner of such contraband portion (The Sarah Christina 1 Rob. 242.) If the owner of the ship and the contraband articles be one, the ship itself is confiscated; but otherwise, except under very aggravated circumstances (The Ringende Jacob, 1 Rob. 91; see ib. 288–329), the carrying of contraband involves only the loss of freight and expenses. Such aggravated circumstances are, when a false destination is pretended for the ship (The Franklin, 3 Rob. 217), or similar deception takes place.

The offence is generally considered to be deposited with the cargo, and the vessel on her homeward voyage not to be subject to confiscation (The Frederick Molke, 1 Rob. 87), although the fact of her having conveyed contraband would on such homeward voyage subject her character to suspicion (The Margaretha Magdalena, 2 Rob. 140). Under special circumstances, however, even on her homeward passage, such ships may be captured and condemned (The Charlotte, 6 Rob. 386; The Margaret, 1 Act. 333; The Baltic, 1 Act. 25).

Reference has already been made to the right of pre-occupancy and pre-emption. This is a right by which the authorities in the country of the captor of contraband cargo, being provisions destined for the enemy, instead of exercising their extreme right of confiscation, appropriate the cargo, paying for it to the owner a reasonable price, and the expenses involved in its conveyance. In one of his most luminous judgments, Sir William Scott has elucidated the law upon this subject.[4]

"The right of taking possession of cargoes of this description, commeatus or *provisions* going to the enemy's ports, is no peculiar claim of this country; it belongs generally to belligerent nations; the ancient practice of Europe, or at least of several maritime States of Europe, was to confiscate them entirely: a century has not elapsed since this claim has been asserted by some of them. A more mitigated practice has prevailed in latter times of holding such cargoes subject only to a right of pre-emption, that is, to a right of purchase upon a reasonable compensation to the individual whose property is thus diverted. I have never understood that on the side of the belligerent this claim goes beyond the case of cargoes avowedly bound to the enemy's ports or suspected on just grounds to have a concealed destination of that kind; or that on the side of the neutral the same exact compensation is to be expected which he might have demanded from the enemy in his own port; the enemy may be distressed by famine, and may be driven *by his necessities to pay a famine price for the commodity if it gets there; [*65] it does not follow that, acting upon my rights of war in intercepting such supplies, I am under the obligation of paying the price of that distress. It is a mitigated exercise of war on which my purchase is made. It is a reasonable idemnification—fair profit on the commodity, that is, due reference being had to the original price actually paid by the exporter, and the expenses which he has incurred."

[4] The Haabet, 2 Rob. 64.

APPENDIX.

[*67] *BELLIGERENT RIGHTS.

ANSWER TO THE PRUSSIAN MEMORIAL.

THE doctrines laid down in the text receive considerable light from the celebrated report of the King in answer to the Prussian Memorial in 1753. Some extracts from this admirable document, which has been already referred to, pp. 14, 48, are therefore subjoined.

Charles VI., Emperor of Germany, in 1734–5, borrowed money of English subjects, "private men," on the security of the revenues of Silesia. By the Treaty of Dresden, in 1745, Maria Theresa, the Empress Queen, his successor, transferred that country to the King of Prussia, Frederic II., on the terms, amongst others, that he should undertake the discharge of this debt selon le contrat.

By this agreement he ultimately refused to abide, alleging, as his excuse, that during the war his subjects had sustained great losses at sea from the English cruisers—the truth being, that the conduct of his subjects, who desired to derive an illegal advantage from their neutral character, justified the confiscations of which he complained. Prussia having stated these, which she esteemed her grievances, in a memorial she presented to the Court of Great Britian, four of the most eminent lawyers of the day, two of them being civilians, were ordered to report upon the subject, and it is from their report, which bears date January 18, 1753, the following extracts have been made. The document, which is well worthy of a perusal, will be found in the Collectanea Juridica, vol. i., 129–66; and a full detail of the circumstances, as well as some useful observations thereon, in Martens' Causes Celébres du Droit des Gens, i. 7, 4.

When two Powers are at war, they have a right to make prizes of the ships, goods, and effects of each other on the high seas: whatever is the property of the enemy may be acquired by capture at sea, but the property of a friend cannot be taken provided he observe his neutrality.

Hence the law of nations has established—

1. That the goods of an enemy on board the ship of a friend may be taken.

[*68] *2. That the lawful goods of a friend on board the ship of an enemy ought to be restored.

3. That contraband goods going to the enemy, though the property of

a friend, may be taken as prize, because supplying him with that enables him better to carry on the war is a departure from neutrality.

By the maritime law of nations, universally and immemorially received, there is an established method of determination whether the capture be or be not lawfully prize.

Before the ship or goods can be disposed of by the captor, there must be a regular judicial proceeding, wherein both parties may be heard, and condemnation thereupon as a prize, in a Court of Admiralty, judging by the law of nations and treaties.

The proper and regular courts for these condemnations is the court of that State to whom the captor belongs.

The evidence to acquit or condemn, with or without costs or damages, must, in the first instance, come merely from the ship taken, namely, the papers on board and the examination on the oath of the master and other principal officers; for which purpose there are officers of admiralty in all the considerable sea-ports of every maritime power at war, to examine the captains and other principal officers of every ship brought in as prize upon general and impartial interrogatories; and if there do not appear from thence ground to condemn as enemy's property or contraband goods going to the enemy, there must be an acquittal, unless from the aforesaid evidence the property should appear so doubtful that it is reasonable to go into further proof thereof.

A claim of ships or goods must be supported by the oath of somebody at least as to belief.

The law of nations requires good faith; therefore every ship must be provided with complete and genuine papers, and the master at least should be privy to the truth of the transaction.

To enforce these rules, if there be false or colorable papers, if any papers be thrown overboard, if the master and officers examined in præparatorio grossly prevaricate, if proper ship's papers are not on board, or if the master and crew cannot say whether the ship or cargo be the property of a friend or enemy, the law of nations allows, according to the different degrees of misbehaviour or suspicion arising from the fault of the ship taken or other circumstances of the case, costs to be paid or not relieved in case of acquittal and restitution. On the other hand, if a seizure is made without probable cause, the captor is adjudged to pay costs and damages, for which purpose all privateers are obliged to give security for their good behaviour; and this is referred to and expressly stipulated by many treaties.

Though from the ship's papers and the preparatory examinations the property do not sufficiently appear to be neutral, the claimant is often indulged *with time to send over affidavits to supply that defect: if he will not show the property by sufficient affidavits to be neutral, [*69] it is presumed to belong to the enemy. Where the property appears from evidence not on board the ship, the captain is justified in bringing her in, and excused paying costs, because he is not in fault, or, according to the circumstances of the case, may be justly entitled to receive his costs.

If the sentence of the Court of Admiralty is thought to be erroneous, there is in every maritime country a superior court of review, consisting

of the most considerable persons, to which the parties who consider themselves aggrieved may appeal; and this superior court judges by the same rule which governs the Court of Admiralty, namely, the law of nations and the treaties subsisting with the neutral power whose subject is a party before them. If no appeal is offered, it is an acknowledgment of the justice of the sentence by the parties themselves, and conclusive.

* * * * * *

Though the law of nations be the general rule, yet it may, by mutual agreement between two powers, be varied or departed from; and where there is an alteration or exception introduced by particular treaties, that is the law between the parties to the treaty, and the law of nations only governs so far as it is not derogated from by the treaty.

Thus by the law of nations, where two Powers are at war, all ships are liable to be stopped and examined to whom they belong, and whether they are carrying contraband goods to the enemy; but particular treaties have enjoined a less degree of search, on the faith of producing solemn passports and formal evidences of property, duly tested. Particular treaties too have inverted the rule of the law of nations, and by agreement declared the goods of an enemy on board the ship of a friend to be free.

If a subject of the King of Prussia is injured by or has a demand upon any person here, he ought to apply to his Majesty's courts of justice, which are open and indifferent to foreigner or native; so vice versa, if a subject here is wronged by a person living in the dominions of his Prussian Majesty, he ought to apply for redress in the King of Prussia's courts of justice.

If the matter of complaint be a capture at sea during the war, and the question relative to prize, he ought to apply to the judicatures established to try these questions.

The law of nations, founded upon justice, equity, convenience, and the reason of the thing, and confirmed by long usage, does not allow of reprisals, except in case of violent injuries, directed or supported by the State, and justice absolutely denied in re minime dubiâ by all the tribunals, and afterwards by the prince. Where the judges are left free and give sentence according to their conscience, though it should be [*70] *erroneous, that would be no ground for reprisals.

* * * * * *

Each [every] crown has no doubt an equal right to erect Admiralty Courts for the trial of prizes taken by virtue of their respective commissions, but neither has a right to try the prizes taken by the other, or to reverse the sentences given by the other's tribunal. The only regular method of rectifying their errors is by appeal to the superior court.

* * * * * *

The King of Prussia has engaged his royal word to pay the Silesia debt to private men. It is negotiable, and many parts may have been assigned to the subjects of other powers. It will not be easy to find an instance where a prince has thought fit to make reprisals upon a debt due from himself to private men. There is a confidence that this will not be done. A private man lends money to a prince upon the faith of an en-

gagement of honor, because a prince cannot be compelled, like other men, in an adverse way, in a court of justice. So scrupulously did England, France and Spain adhere to this public faith, that, even during the war, they suffered no inquiry to be made whether any part of the public debt was due to subjects of the enemy, though it is certain many English had money in the French funds, and many French had money in ours.

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*II.—NOTE ON LICENSES. [*71]

As far as the *principles* of the law of nations are concerned, sufficient has been stated in the text (p. 45) in respect to the law of licenses. It may, however, be desirable, for practical purposes, to state the effect of some other decisions which have a bearing thereupon.

Although, as a general principle, licenses to trade are to be construed strictly,[1] the circumstances of a war may induce the courts to regard them with a more favorable eye, provided always there is bona fides in the holder (The Goede Hoop, Edw. 329—32—50—4.) In such case allowances are usually made for unavoidable circumstances that may prevent an exact compliance with the conditions of the license (The Dankbaarheit, 1 Dods. 187.) This, however, is never done, when the material conditions of the license have not been complied with (The Anna Maria, 1 Dods. 209; Vandyck v. Whitmore, 1 East, 475,) and a trading license to an enemy is always, for obvious reasons, interpreted with the utmost strictness (The Manly, 1 Dods. 259.) When a license is granted by Government, it is presumed to legalize all steps necessary to give it effect (The Clio, 6 Rob. 70; Kensington v. Inglis, 8 East, 273;) and when the terms of a license are general, it matters not who act under it, provided they are faithful to its terms (The Acteon, 2 Dods. 52.)

A cargo imported on account of an enemy is not protected by a *general* license (The Josephine, 1 Act. 313;) but the words in the license, "to whomsoever the property may appear to belong," excluding all inquiry into the proprietary, will indirectly protect even enemy's property (The La Cousine Marianne, Edw. 346,) and cure some other defects besides (Fayle v. Bourdillon, 3 Taunt. 546.)

If the ship of a country, other than that named in the license, is employed, the transaction will be viewed leniently, unless the relations of the two countries with ours materially differ (The Dankbaarheit, ut cit.,) but a license for importations on board a neutral ship will not protect property on board a British ship (The Jonge Arend, 5 Rob. 14,) unless indeed that ship have a foreign appearance, and the cargo be embarked in ignorance of its ownership (The Gute Hoffnung, 1 Dods. 251; The Bennet, ib. 181.)

[1] But see Flindt v. Scott, and Same v. Crockatt, 5 Taunt. 674.

[*72] When the time fixed in the license has expired, the licensee does *not necessarily forfeit the benefit his license is intended to yield him. Thus if, in endeavoring to fulfil that condition in his license, he is hindered by the enemy (The Aeolus, 1 Dods. 302,) or stress of weather (Groning v. Crockett, 3 Camp. 83,) or perils of the sea affecting the cargo (Siffkin v. Glover, 4 Taunt. 717,) or by the cargo suffering in some other respect (The Wohlforth, 1 Dods. 306,) he is excused. The cases upon this head are very numerous, but they all conduct us to the conclusion that a resolute attempt to complete the voyage within the time the license specifies, is accepted generally by our Admiralty Courts as a reason to adjudging the license not to be avoided by default.

The port of shipment named in a license, (The Twee Gebroeders, Edw. 95,) and that of destination, (The Henrietta, 1 Dods. 173; The Europa, Edw. 342; Evereth v. Tunno, 1 B. & A. 142,) must not be deviated from, nor will it be suffered that on her way the vessel covered by the license should touch at an intermediate port (The Hector, Edw. 379,) especially an interdicted port (The Frau Magdalena, ib. 367,) indulgence however, being sometimes shown when ignorance of the port being interdicted, is proved to the court's satisfaction (The Emma, ib. 366.)

A license with fraud appearing on its face is void (Shiffner v. Gordon, 12 East, 296,) still the fact that it is purchased will not avoid it (The Acteon, ut cit.;) but this result will follow any alteration made in it fraudulently, although without the complicity of the party claiming its protection (The Louise Charlotte de Guldeneroni, 1 Dods. 308,) whenever the intention of the grantor in favor of such alteration is not sufficiently shown (The Cosmopolite, ut cit.) The carriage of contraband (The Nicoline, Edw. 364,) and enemy's correspondence (The Acteon, ut cit.,) will under all circumstances avoid a license.

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DIPLOMACY.

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DIPLOMACY.

DIPLOMACY is the science of the external relations of independent States towards each other.

This science is founded on Treaties, Conventions, or other acts of sovereign princes and States, which were formerly called *Diplomas*, and which more particularly establish the relative rights of nations, and the obligations to which they are respectively pledged. But the relations of independent States towards each other do not originally rest upon express stipulations only; there is a natural law, denominated the *Law of Nations*, that traces the rights to which nations are respectively entitled. But, since there is no superior coercive power to enforce the performance of these corresponding obligations, nations are induced to unite together by means of treaties, the object of which is to render them more secure in the enjoyment of their rights. Numerous collections have been made of the principal treaties which thus regulate the external relations of the independent States of Europe and America; the titles of which are stated by Baron von Martens, in the Bibliothèque Diplomatique Choisie annexed to his Manuel Diplomatique. (Paris, 1822, 8vo.) The principles of the modern law of the nations of Europe, founded upon treaties and usage, have been extracted from these collections, and arranged by the distinguished publicist, G. F. de Martens, in his Précis du Droit des Gens Moderne de l' Europe (3rd edition, Gottingen, 1821, 8vo.,) and also in J. L. Klüber's Droit des Gens Moderne de l' Europe. (Stuttgardt, 1819, 2 vols. 8vo.) Much information may likewise be derived from an attentive study of the memoirs and letters of eminent statesmen and negotiators.

As diplomacy is the knowledge of the actual relative rights of nations, it constitutes the basis of the negotiations to which Governments have recourse when alliances are to be formed; when new stipulations are to be entered into, upon points in which two or more independent States are mutually concerned; or when disputes are to be settled, concerning the non-performance of some obligations, or the violation of certain rights.

[*88]

*Section I.

OF DIPLOMATIC MISSIONS.

§ 1. Diplomatic Missions may be divided, according to the nature of the affairs which gives occasion to them, into (1.) Diplomatic Missions, properly so called, the object of which is, affairs of state or politics, and which give rise to any negotiations; (2.) Missions of Ceremony or Etiquette, the object of which is notifications, or compliments of congratulation or condolence, which sovereigns, especially those of the first rank, are in the habit of sending to one another; and (3.) Fixed Missions, in which the diplomatic agent, except in extraordinary cases, is charged with watching over the various objects above mentioned.

§ 2. Where (as is frequently the case) Governments are desirous of treating privately on certain affairs, which they are in any way interested in concealing from the knowledge of other cabinets; in such case it is usual to send confidential persons, and secretly to accredit them to a foreign Government, or rather to the minister for foreign affairs only, without giving them the formal character of public ministers, or at least authorizing them to exhibit it only when the negotiation shall be brought to the desired point. The reigns of Louis XIV. and XV. present many instances of the employment of such secret diplomatic agents in foreign countries. (Bielfeld, Institutions Politiques, tom. ii. p. 278, 284; Flassan, Hist. de la Diplomatie Française.) Many similar missions took place during the American war, and in the earlier years of the first French revolution.

Although such agents have no pretensions to any diplomatic ceremonial, still they enjoy all the rights and immunities due to a public minister. (Bielfeld, Institutions Politiques, tom. ii. p. 176; Callières, de la Manière de Negocier, ch. v. p. 112.) With regard to secret emissaries whom Governments sometimes send abroad for political purposes, but without the knowledge of a foreign Government, the latter has a right to send them out of its territory; and, if they afterwards become guilty of being spies, such Government may punish them according to the utmost rigor of the laws.

§ 3. By a Public Minister is generally understood every public functionary, who has the chief direction of any department in the administration of a State: in the proper acceptation of the word, it means
[*89] every person who is sent by any Sovereign *or Government into a foreign country, to treat on affairs of State, or to break off negotiations; and who, being furnished with credentials or with full powers, enjoys the privileges granted by the law of nations to the public character with which he is invested. In this last acceptation the universal law of nations speaks of public ministers, and of their rights, immunities, and prerogatives. The customary law of nations, however, at present extends these rights equally to those public ministers who are sent solely for purposes of mere ceremony, and to those who are sent on a permanent mission.

§ 4. When at the solicitation of two powers that are at variance, or at least with their consent, a third power or several powers interpose their *good offices* or their *mediation* for the re-establishment or maintenance of peace, they become *mediators;* and the ministers, sent by them to a congress or to foreign Courts for this purpose, are termed Ministers mediators. It is important to remark, that the quality of *mediator* must not be confounded with that of *arbitrator;* which is, when two powers that are at variance voluntarily submit the point in dispute to the decision of a third power, and the latter becomes an arbitrator. This mode of terminating disputes between powers is now of very rare occurrence, while the interposition of *good offices*, on the contrary, is very frequent.

§ 5. The right of appointing public ministers to represent the State, which sends them to a foreign Court or government, belongs only to those States which are entirely independent of the Government to which they are sent; and *demi-sovereign* States can only exercise this right, when they are authorised to do so by the sovereign power on which they are dependent. This was the case with the princes who were members of the Germanic body during the existence of the empire of Germany, and also with the former Dukes of Courland. Since the year 1774 the hospodars of Wallachie Moldavia have enjoyed the right of having Chargés d'Affaires (who may be Christians, members of the Greek church) at Constantinople, under the protection of the law of nations, that is to say, secure from all violence. (See The Treaty of Peace of Kainardgi, art. 16; Vattel, Droit des Gens, liv. iv. sec. 60.)

The exercise of the right of sending diplomatic agents belongs exclusively to the sovereign in monarchies, and to the representatives of the people, to the senate, or to the president, in republics. The question, whether a public minister may be received from an usurper? depends upon the reasons of State, which may lead particular Governments to adopt or to reject the principle. (See Wicquefort, l'Ambassadeur et ses Fonctions, liv. i. ch. iii.) An unequal alliance or a treaty of protection, not being incompatible with sovereignty, does not deprive a State of the power of sending or of receiving public ministers, unless, indeed, it has expressly renounced the right of maintaining relations, and of treating with *other Powers. (Vattel, Droit des Gens, liv. i. sec. 5, 6; liv. iv. sec. 57, 58.) [*90]

When disputes arise relative to the right of sending or receiving public ministers, or rather when political circumstances render it difficult for one or both of such powers publicly, that is ostensibly, to exercise this right; in such case they confine themselves reciprocally to the sending of diplomatic agents, who are destitute only of the representative character.

§ 6. Every sovereign State (without, however, being obliged to do so) has a right to receive public ministers from other Powers, unless it has entered into contrary obligations by treaties or by express conventions; it may also determine upon what conditions it will consent to receive them. There are Governments, which have established it as a principle never to receive from any foreign Power one of their own subjects, as a public minister; it also frequently happens that a Government refuses to receive

some particular individual in a public capacity, in which case the ground of refusal is specially stated. In order to avoid such refusals, it is now usual to take the precaution of apprising the Government, to which a public minister is to be sent, of the person selected for that purpose; and if the question relate to a negotiation, strictly so called, several individuals are proposed, from whom such Government may choose one.

§ 7. The constitution and laws of a State limit the power of those who have the nomination of public ministers; and also prescribe the requisite qualifications of those on whom the character of a public minister is to be conferred, as well as the obstacles to such appointment which may be interposed by religion, birth, or other circumstances. (On this topic consult Wicquefort l'Ambassadeur, liv. i. ch. vii. viii. ix. xi. xiii.) Women are rarely chosen to discharge the functions of public ministers, though a few instances are recorded in history. Thus the lady of the Maréchal de Guebriant was accredited, in 1646, as Ambassadress from France to the Court of Vladislaus IV., King of Poland; where she sustained that character with dignity, and succeeded in the principal objects of negotiation. (Moser, l'Ambassadrice et ses Droits, Berlin, 1757. 4to.)

The class of ministers to be sent is subject to certain restrictions, which are fixed by the diplomatic ceremonial introduced among the Powers of Europe. In consequence of these restrictions it is now generally recognized:—1. That the right of sending ministers of the first class belongs exclusively to States enjoying the honors of royalty; and 2. That no State enjoying such honors can receive ministers of the first class from those who are not possessed of them. Those States, however, which do not enjoy the honors of royalty may reciprocally send ministers of the
[*91] first class; and conformably to the same principle of reciprocity *most powers at present send to each other ministers of the same class.

§ 8. Although the aggregate of all the Diplomatic Agents of foreign Powers, residing at one time in the same place for diplomatic purposes, is ordinarily termed the Corps Diplomatique, or diplomatic body, yet the universal law of nations knows nothing of the division of ministers into different classes. It considers them all as being charged with the affairs of the State which they represent; but only as to those affairs, the management of which is intrusted to them; and from this quality it derives the different rights which it grants to them. But the positive law of nations has introduced several classes of diplomatic agents, who are distinguished by the diversity of their representation and of the ceremonial which they respectively enjoy. (Wicquefort, l' Ambassadeur, liv. i. ch. 1, Vattel, Droit des Gens, liv. iv. ch. vi. sec. 69, et seq.; Martens, Précis du Droit des Gens Moderne, p. 289.) The distinction of such agents into two classes first commenced towards the end of the fifteenth century, and it was not until the eighteenth century, that three classes were recognised. (Bielfeld, Institutions Politiques, tom. ii. p. 170, et seq.) The same number was adopted by the regulation, made at the Congress of Vienna, in 1815, by the eight Powers that signed the Treaty of Paris.

§ 9. Those diplomatic agents are ranked in the class of ministers of the first order, who enjoy the *representative character in the highest and*

most eminent degree by virtue of which they represent the State or Sovereign by whom they are sent, both in the particular affairs with which they are charged, and also on all occasions wherein they may claim the same honors which their constitutent would enjoy if he were present. Of this number are—1. Cardinals, Legates à latere, or de latere, sent by the Pope; 2. Papal Nuncios; 3. Ministers, sent with the character of Ambassadors. Nuncios and ambassadors are divided into ordinary and extraordinary. This distinction was at first employed, in order to distinguish permanent missions from those which had for their object a special and extraordinary negotiation. (Vattel, liv. iv. sec. 71.) The extraordinary character, at present, is considered as being a degree higher than that of an ordinary ambassador; and is sometimes granted to those who are destined to reside an indeterminate time at a Court.

§ 10. All ministers of inferior orders are *destitute of the representative character, strictly so called;* and represent the State or Sovereign sending them, only for the affairs with which they are charged in his name, either in behalf of the Governments whose proxies they are, or in behalf of the subjects of their prince, whose natural protectors they are in foreign countries. Beyond this, at least, they represent him only in an indeterminate manner. The *mode of representing their constitutent is the same for all ministers of this class, and, in this [*92] respect, there are in fact but two classes of ministers; but, so far as regards the dignity conferred upon them, and the diversity of the ceremonial which at present is introduced into most of the European Courts, we are constrained to admit a distinction between ministers of the second and third order; and under this point of view the following are denominated ministers of the second order, viz.—1, Envoys, whether they are simply qualified with the title of Envoys, or with that of Envoys Extraordinary, or of Envoys Extraordinary and Ministers Plenipotentiary; 2, Ministers Plenipotentiary; and 3, Papal Internuncios.

§ 11. The shades of difference, which exist between ministers of the third class, may be determined in a similar manner. They comprise—1. Ministers; 2. Ministers Resident; 3. Ministers Chargés d' Affaires; 4. Consuls, to whom a diplomatic character is attributed; and 5. Chargés d' Affaires, nominated by States or Sovereigns to Courts, where they do not wish to send agents with the title of ministers.

As the ceremonial, to which this class of ministers may lay claim, especially from the other members of the diplomatic body, is by no means fixed, the usage which obtains in each Court must be followed in this respect. Most of them (with the exceptions of the diplomatic agents of the Hanse Towns) have no letters credential for the Sovereign, and are accredited only by letters addressed to the Minister or Secretary of State for the department of Foreign Affairs. But we must not confound with ministers of the third order temporary Chargés d' Affaires, or Chargés d' Affaires, strictly so called, who are frequently only verbally accredited by their minister, who presents them in this character on his departure. Cardinals, however, who are Chargés d' Affaires of the Pope, rank as ministers of the first class. (De la Maillardière, Précis du Droit des Gens, p. 330.)

§ 12. Sometimes the name of Deputies is given to ministers, who are sent to a congress, or who are accredited on behalf of an assembly of States, or of a Corporation; as was the case with the former United provinces of the Netherlands, the Swiss Confederation, and the Corporation of the Hanse Towns; and the appellation of Commissioners is given to those diplomatic agents who are sent by their respective Governments to regulate territorial limits, to terminate differences repecting jurisdiction, or for the execution of some particular article of a treaty or convention. But these titles can neither confer upon them, nor take away from them, the privileges and immunities of ministers: in general they enjoy those which are granted to ministers of the second or third order. Everything else depends upon the question, to what point their constituent would give a ministeral character to them.

[*93] *§ 13. One of the most useful modern institutions in behalf of commerce is that of Consuls. Their functions consist in promoting anywhere, and everywhere, the commerce of their fellow-citizens: sometimes they act as arbitrators in difficulties or disputes which may arise between the seamen or merchants of the nation to which they belong. At present, consuls have no judicial power in Europe, but they are enjoined to endeavor amicably to settle the difference between their countrymen and the natives of the place where they reside. Applications are also made to them by seamen and merchants for any information, which they may need relative to local authorities, laws, treaties, &c. It is their province, further, to communicate to the Minister of Marine or for Foreign Affairs, of their respective countries, such intelligence and observations as they may deem of importance to the commerce and navigation of their country; they deliver authentic certificates to seamen and merchants; they give advice or assistance in every case that depends upon them; and finally, they watch over the observance of commercial treaties in everything which may affect the interests of their respective countries.

Consuls may be either the subjects of the nation by which they are employed, or they may belong to another nation: but they cannot be subjects of the State wherein they reside (Vattel, liv. ii. sec. 34), without having an express and special permission for this purpose from such State. (Martens, Manuel Diplomatique, sec. 13, note 21.) In this case they, temporarily, cease to be subjects of the prince in whose dominions they reside; and, like other consuls, they are exempt from the criminal jurisdiction of the sovereign and of his magistrates. They enjoy exemption from taxes and personal services; their houses are exempt from the burden of lodging troops: and they have a right to place the arms of the sovereign who employs them above their gates.

Although consuls are under the special protection of the law of nations, and may, in a general sense, be considered as Diplomatic Agents of the State by which they are nominated; yet, as it respects their privileges, they cannot be ranked among public ministers, not even those of the third order; because they are not furnished with Letters of Credence, having only letters patent of their appointment; and because they cannot enter upon their functions until they have been confirmed by the

sovereign in whose dominions they are about to reside. Those who are sent into the Barbary States, or to the Straits of the Levant, are an exception to this rule and practice, and are the only consuls who are accredited and treated as ministers. Most of them, and especially the Consuls General, who are nominated by some powers (whether for several places or be at the head of several consuls), enjoy in some respects more privileges than those who are sent to European ports; and sometimes they are assisted by several Vice-Consuls or Chancellors of the Consulate.

*The Commissioners of Marine, who are established in some sea-ports instead of consuls and vice-consuls, differ but little [*94] from them, and must consequently be placed in the same rank. But those merchants who, in some commercial cities bear the title of Commercial Agents of a foreign Power, must be considered as simple commissioners, who are charged with the making of purchases or payments on account of their respective Governments.

§ 14. Mere Agents, who are charged with the particular or private affairs of a State or Sovereign, even though they should be termed residents, counsellors of legation, or should have any other title, yet have no claim to the rights of a diplomatic agent, nor to the privileges and immunities, nor to the ceremonial, of public ministers. The concessions sometimes made to them by minor or less powerful States are not sufficient to constitute a rule: besides, such agents never carry with them letters credential, but only letters patent, or letters of recommendation.

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*Section II. [*95]

OF THE DESPATCHING OF A DIPLOMATIC AGENT, AND THE ESTABLISHMENT OF HIS PUBLIC CHARACTER.

The documents which relate to the despatching of a Diplomatic Agent, and to the establishment of his public character, are the three following: viz., a Letter of Credence, Instructions, and a Full Power, if there be occasion for one.

§ 15. In order to be received in the character of a diplomatic agent by the State to which he is sent, and that he may enjoy the honors and privileges attached to his rank, and recognised by the law of nations, such agent ought to be provided with Credentials or a Letter of Credence, addressed by the Sovereign who sends him to the Sovereign or Power by whom he is to be accredited. But an exception is made from this rule in the case of Chargés d'Affaires, who have only a letter addressed to the Prime Minister or Secretary of State for Foreign Affairs, as the case may be.

This letter of credence contains the general design of the diplomatic mission, which ordinarily consists in the maintenance of reciprocal good friendship. These motives are generally set forth in obliging terms,

suitable to the relations subsisting between the two Courts, both with regard to ceremonial, and also with respect to the mutual connections of interest and friendship. After this introduction the minister is mentioned by name; the quality with which he is invested is specified; and the sovereign to whom he is sent is requested to give credit to what he shall say on behalf of his Court. If such minister be charged with any particular affair it is mentioned, but only in general terms, and the letter concludes with assurances of friendship, according to the relations subsisting between the two sovereigns, and the degree of honor which they reciprocally give to each other.

In order that the Sovereign, to whom the latter credential is addressed may be apprised of its contents, previously to its being delivered by the foreign minister, and also that he may decide upon his admission, as well as on the ceremonial to be observed towards such minister, it is usual either to despatch the letter under a *flying seal*, (cachet volant, that is, a seal which though laid upon the envelope, does not close it,) or rather, [*96] to send an *authenticated* **copy* from the Chancery of the State, in addition to the original letter which is signed by the sovereign himself, and sealed with the Great Seal of the State; and this authenticated copy the diplomatic agent delivers, at the time of his arrival, to the Minister for Foreign Affairs, or to some other minister acting for him, demanding at the same time an audience of the sovereign, in order that he may deliver the original.

The power of a minister ceases, both by the death of the sovereign who employs him, and by the death of him to whom he is sent; whence it becomes necessary that he be accredited anew. This is often done, in the first case, by the very letter of notification which the successor writes to the sovereign, at whose Court the minister resides, on occasion of his predecessor's decease. In the second case, the not sending of new credentials would indicate that the new sovereign would not be acknowledged by the prince whom the minister represents. When a minister has received new letters of credence, he resumes his authority and his functions, without any other ceremonial than that of presenting them to the sovereign whom he addresses in the terms prescribed to him by his Court.

One letter of credence may suffice for two or more ministers who are sent at once, if they are of the same order. In like manner one minister may be charged with several letters of credence, when he is accredited to several Courts at once, (as is the case with several of the ministers who are accredited to the petty Courts of Germany,) or to one and the same prince, but in several qualities.

Answers are rarely sent to letters of credence, unless a sovereign have special reasons for replying; such as on the choice of the minister sent to him, or when he considers his mission as a special mark of esteem and friendship. But all letters of credence must not be confounded with mere Letters of Recommendation, of which a minister is sometimes the bearer, and which are addressed by the sovereign to the princes or princesses of the family, or to one of the principal functionaries of the sovereign to whose Court he is accredited, or lastly, to the chief magistrate of the place where he will reside. Martens has given numerous

precedents of credentials, letters of recall, and of new credence, in the Appendix to his Manuel Diplomatique, pp. 328–340.

§ 16. The Instructions given to a minister contain the secret commands of his master, the orders to which he must carefully conform, and which limit his powers; they communicate to him the line of conduct which he is to pursue during the course of his mission, both towards the Court to which he is sent, the members of the diplomatic body, &c., and also with respect to the objects of his mission. A minister ought to desire that his instructions may be very particular, especially when he is charged with any *intricate negotiations. He ought most scrupulously to examine every point; to procure explanations of every [*97] obscurity and ambiguity, and the alteration of any part which he judges may obstruct the success of his negotiation; to cause everything to be omitted that may render his conduct suspected or odious, or his person ridiculous; and to obtain the insertion of what may recommend either the one or the other, and procure a greater satisfaction to his master. He ought also to consider, that the more general his instructions are, the greater is his responsibility in reference to the event of the affairs intrusted to his negotiation.

Besides the first instructions given to a minister or other diplomatic agent, on repairing to his post, the letters sent to him from his sovereign or from the Minister of Foreign Affairs, in the course of his mission, must be regarded as new instructions, or as a development of those formerly given to him. Instructions are destined exclusively for the minister, and consequently not to be divulged, unless he is commanded to communicate them, or unless from special motives he believe himself authorized to communicate some part of them. It also frequently happens that two sets of instructions are made out, one of which is drawn up *to be shown* in case of need, and the other is *secret*, and for the sole use of the minister.

No public minister can, without violating the law of nations, be compelled to show his instructions. He requires no other title to give credit to what he utters on the part of his sovereign, than the letter of credence which he has presented, or the full power which he has communicated. (Wicquefort, liv. i. ch. xiv.; Vattel, liv. iv. sec. 77; Martens, Précis du Droit des Gens, p. 309. In his Manuel Diplomatique, App. pp. 307–327, Martens has printed several sets of instructions to ambassadors.)

§ 17. The power, says Wicquefort, with respect to an ambassador, is precisely the same as a letter of attorney to a private person. Every minister who is charged with a negotiation, properly so called, ought to be furnished with a *Full Power* indicating the degree of authority confided to him, and on the faith of which a negotiation may be commenced with him. Such full power ought to state expressly whether a minister is authorized only to *listen* to propositions, in order to report them, or to *propose*, or even to *conclude* them; and where there are several ministers, it should be stated whether they are authorized to act separately. The full power may be inserted in the letter of credence, but it is most usually drawn up in the form of a *Letter Patent*. Ministers who are sent

to a Congress, Diet, &c., ordinarily have no credentials, but merely a full power, which legitimates their appointment, and of which they interchange authenticated copies, or rather deliver them into the hands of a directing minister, or minister acting as meditator, if there be one.

[*98] *§ 18. As the ministers of Governments, on many occasions, require that their correspondence with their agents abroad should be kept very secret, it is usual to employ *Ciphers* in drawing up the orders or instructions given to diplomatic agents, and also in writing the reports or dispatches which the latter send to their respective Governments. A double key is given to each minister previously to his departure, viz., the cipher for writing ciphers, (chiffre chiffrant,) and the *cipher for deciphering*, (chiffre dechiffrant.) Ciphers, however, ought to be employed only in affairs which really demand secresy. Besides the cipher which a public minister receives in order to correspond with his Court, it is usual to give him a *common cipher*, (chiffre banal,) which is known to all the ministers of the same power, who occasionally make use of it in their correspondence with one another.

When there is reason to suspect that a cipher is known to the Cabinet of the Court, wherein a minister resides, recourse is had to a pre-concerted *sign*, in order to *annul* entirely or in part what has been written in ciphers, or rather to indicate that the contents are to be understood in an inverted or contrary sense; a *Cipher of Reserve* is also employed in such extraordinary cases. Martens has given a dispatch in ciphers in the Appendix to his Manuel Diplomatique, which dispatch will be found on page 125, infra.

§ 19. It is a principle now generally recognized, that *during peace* every Government ought to grant a free and safe passage to every traveller that is not suspected, and especially to all those who hold a public character, and who are in the service of a foreign power. At such times, consequently, they have no occasion for any other passports than those which are given to them by the competent authority of their own Government. *In time of war*, however, in order that a public minister, or any other diplomatic agent, may safely repair to the place of his destination, he must further be provided with *Passports* or *safe-conducts*, authorizing him to cross the territory of the foreign States, with which his own Sovereign or Government is at war.

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*Section III.

OF THE RIGHTS AND PRIVILEGES ENJOYED BY DIPLOMATIC AGENTS.

§ 20. As all diplomatic agents more or less represent their constituents, usage has impressed a sacred character upon them, and has attributed to them peculiar distinctions and immunities which are founded upon

the nature of their functions; and according to this principle all claims are to be judged, to which they may give rise. Although the public character of a diplomatic agent at a foreign Court is not fully developed, and though the enjoyment of his rights are not secured to him, until he has delivered his credentials and his diplomatic capacity has been recognized by the Government or Court at which he is to reside; still it is now recognized as a principle by all the powers of Europe, that as soon as a Court is made acquainted with his mission, a public minister of whatever rank he may be, ought to enjoy the most eminent inviolability of person, from the moment he touches the territory of the State to which he is accredited, to the moment of his departure. In consequence of this principle, as soon as a Government has recognized a foreign minister, as the representative of his sovereign, it is bound, not only itself to refrain from every act which would be contrary to that inviolability attached to the minister's person, but also to punish severely, and as a State crime, every crime committed against the person of a diplomatic agent; on the supposition, however, that the offender knew the person against whom he committed an act of violence; that he was also subject to the jurisdiction of the country wherein the offence was committed; and that the minister himself had not provoked such act of personal violence. This inviolability, which is due to every diplomatic agent, is exercised even where a misunderstanding arises between the two Governments, and most frequently also when, in cases of rupture, hostilities have actually commenced. The Ottoman Porte is the only Court that adheres to the custom of detaining as hostages foreign ministers, whose Governments are at war with it, and confines them in the castle of the Seven Towers; wherein, however, they are secured against any excesses which the populace of Constantinople might commit against their persons or their hotels. (Wicquefort, liv. i. ch. xxvii; De Real, Science du Gouvernement, tom. v. sec. 27; Vattel, liv. iv. ch. vii.)

§ 21. *As the dignity of the State, represented by a diplomatic agent, as well as the reciprocal interests of Powers, require that [*100] their proxies or representatives should enjoy entire independence, as to the management of the affairs confided to them, it is an acknowledged principle of the universal law of nations, that they should enjoy the right of Exterritoriality; in consequence of which they are considered as not having quitted the dominions of their sovereign, but as if they continued to live out of the territory in which they actually reside. The positive law of nations extends the notion of this exterritoriality far beyond this length, since it regards not only the minister's person, but also his suite, his hotel, and even his carriages as being out of the foreign territory.

§ 22. Since the independence enjoyed by the public minister of a foreign Power, is a right which is granted to him only in his diplomatic quality, he cannot renounce it either wholly or in part without his constituent's consent. (De Real. tom. v. p. 147.) Hence also a foreign minister can neither accept any employ or title from the sovereign to whom he is sent, without the express permission of his constituent. When a foreign minister is, at the same time, the subject of the State to which he is sent, and his constituent consents that he should be considered as

such, he remains subject to the laws of such State in every respect which does not concern his ministry in his diplomatic capacity. It must, however, be remarked, that every public minister, though previously a subject of the State, to which he is to be accredited, enjoys entire independence during the whole period of his mission, unless the State to which he is sent will receive him only upon the express condition of regarding him as a subject. (Vattel, liv. iv. ch. vii. sec. 92, 93.)

§ 23. Although the universal and strict law of nations should not exempt a diplomatic agent, when abroad, from all the Civil Jurisdiction of the State wherein he resides, yet the exterritoriality founded on the positive law of nations cannot refuse such an exemption to him, except in the following cases: viz., 1. Unless such diplomatic agent was already a subject of the State, wherein he resides, at the time of his nomination, and the latter had not renounced its jurisdiction over him. 2. Unless such agent be at the same time in the service of the sovereign to whom he is sent in the quality of a public minister, as frequently is the case in several of the German Courts: and 3. Unless he have the power or the will to subject himself to the jurisdiction of a foreign State.

§ 24. The nature of the acts which are frequently inseparable from criminal proceedings, and the inconvenience which would thence result to the affairs with which a diplomatic agent is charged, forbid that he should be subjected to the Criminal Jurisdiction of the State to which he is accredited. In case, however, of *private* offences the parties aggrieved must address the *sovereign, who demands justice of the ambassador's master, and in case of a refusal he may command the insolent minister to depart from his territories. But where a foreign minister offends the prince himself, by being wanting in respect to him, or by embroiling the State and the Court by his intrigues, if the offended party does not wish to break off intercourse with the master, he sometimes confines himself to demanding the minister's recall; or if the offence be more considerable, he prohibits him from Court, while he awaits the master's reply. In cases of treason, the Government to which the minister is accredited may command the offending minister to quit its territories within a limited time; and in very urgent cases it may secure his person by sending him under an escort to the frontiers. (Vattel, liv. iv. sec. 94–116.)

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§ 25. Although the design of diplomatic missions, does not prevent the persons, who compose the Suite of a public minister, from being subject to the Civil Jurisdiction of the State to which he is accredited, the positive law of nations, that is to say, the treaties and conventions which have been concluded relative to this point, and especially the usage established in most of the European Courts, at present grant to ministers of the first and second class the exercise of a particular, though limited, jurisdiction over their suite. But it belongs to the two respective Courts to determine the extent of that jurisdiction. Where causes, brought before the Courts of the country wherein the minister resides, require the deposition of a person attached to his suite, the modern practice is, to request such minister, through the Secretary of State for Foreign Affairs,

either to cause the persons summoned to give evidence to appear before those courts to receive the deposition in question; or else to authorise the secretary of legation to take it, and afterwards in due form to communicate it to the authority which made the request.

§ 26. As ministers of the first and second class enjoy immunity from jurisdiction for the persons composing their suite, it remains for the two courts to determine how far the minister may himself exercise such jurisdiction, or refer the parties arraigned to the competent authorities of his own sovereign's dominions. For want of express treaties or conventions on this subject, the established usages must be consulted, which, however, are not always sufficient to constitute a rule.

In consequence of the exterritoriality which extends even to the minister's hotel or residence, it must also be recognized as a principle, that where a crime is committed within such hotel, by or upon the persons belonging to his suite, and the offender has been arrested therein, the Government to which the minister is accredited, can, under no pretext whatever, demand such offender to be delivered up, in order that he may be judged by its courts.

*§ 27. After what has been said on the subject of the Exemption from Civil and Criminal Jurisdiction, which is enjoyed by a [*102] public minister in the country wherein he resides in that capacity, it naturally follows that he can still less be subject to the police regulations, to which the natives, and also all foreigners residing in that country, are obliged to conform. But he is, nevertheless, bound not to disturb the established order; and, further, to take care that nothing be done within his house, which out of doors can lead to a violation of the public safety, or of the statutes or ordinances relating thereto.

§ 28. By the positive law of nations, the movable effects possessed by a foreign minister in his diplomatic capacity, are exempt from all civil jurisdiction, and consequently from arrest. The case is otherwise as to those effects which may come into his possession under other titles, as that of a testamentary executor, or a merchant; which sometimes happens, in maritime places, to consuls. Exemption from arrest is so generally granted to every foreign diplomatic agent accredited to a court, that neither his person, his private property, nor his furniture, can be seized, even though, at his departure, he should not have paid his creditors. In England, this exemption is particularly enacted by the statute 7 Anne, ch. xii.

§ 29. Although both the persons of foreign ministers and their suites are exempted from all personal impositions by virtue of the exterritoriality granted to such ministers; yet they are not exempt from indirect impositions, such as import duties on commodities, tolls on bridges, canals, or roads, postage of letters, &c. But, to what point soever their exemption may extend, it evidently refers only to things which are really for their use. If they abuse their privilege, in order to carry on a disgraceful traffic under it, by lending their name to merchants, the sovereign has an unquestionable right to put a stop to such practices, and to prevent fraud, even by taking away the privilege. This has happened in several

places, where the sordid avarice of some ministers, who carried on trade under their exemptions, has obliged the sovereign to take them entirely away. (Vattel, liv. iv. sec. 105; Martens, Manuel de Diplomatique, sec. 29.)

§ 30. The exterritoriality granted to the person and suite of a minister, extends also to his hotel or residence. His independence, indeed, would be very imperfect, and his personal safety insecure, if the house where he dwells, did not enjoy perfect freedom, and were not inaccessible to the ordinary ministers of justice. An ambassador might be troubled under a thousand pretexts, his secrets might be discovered by a visitation of his papers, and his person exposed to insults. All the reasons which establish his independence and inviolability, concur also to secure the freedom of his hotel.

[*103] The Freedom of Quarters, by which formerly all the houses situated *within a certain distance of a foreign minister's house, on setting up his sovereign's arms against them, (which must be considered as a flagrant abuse, though it was tolerated in several courts,) must now be considered as generally abolished. At Rome, however, a few legations, as those of France and Spain, still enjoy a certain degree of *freedom of quarters;* for instance, in the precinct which is under the protection of the Spanish Ambassador, the duties of the police are discharged only by sbirri belonging to his mission. (Vattel, liv. iv. sec. 117; Martens, Manuel de Diplomatique, sec. 30.)

§ 31. It would be an infringement of the independence of nations, were we to extend the notion of exterritoriality, which is granted to the residence of a minister, to authorizing the latter to arrest the ordinary course of criminal justice, by giving an asylum to persons accused of any crime, whether treasonable or private. Hence, wise limits are now assigned to the exercise of this right, which was formerly so much abused and which enabled every criminal to evade the pursuit of the judicial authorities of a country by taking refuge in the house of a foreign minister. It is a principle, at present recognized by all the powers of Europe, that, when a person is accused of high treason, and it is clear that he has taken refuge in the house of a foreign minister, the Government may not only take the necessary steps *out of doors* for preventing the criminal's escape, but may also proceed to take him *by force*, where a minister refuses to give him up, after he has been duly solicited by the proper authorities.

Though the carriages of public ministers are exempted from the ordinary visits of custom-house officers, nothing can authorize them to make use of their carriages either to withdraw individuals charged with crimes from the competent jurisdiction of the country, or to favor their escape. (Wicquefort, liv. i. ch. xxviii.; Vattel, liv. iv. sec. 118.)

§ 32. Among the other rights, which a public minister ought to enjoy, is comprised that of exercising in his own house the religion which he professes, or rather that of the sovereign whom he represents. But this privileges does not extend beyond the person of an ambassador and his domestics; for though he cannot be prevented from admitting any foreigners who may present themselves at his gate, yet a sovereign may forbid

his subjects to resort to such ambassadors house for matters of religion or otherwise; at present, however, the free exercise of religion is not refused to any ambassadors in any civilised country. (Wicquefort, ut suprà; Vattel, liv. iv. sec. 105.) In many countries, however, this important point is settled by specific treaties.

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*Section IV. [*104]

OF THE SUITE OF A PUBLIC MINISTER.

§ 33. The inviolability of an ambassador is communicated to every individual in his Suite, and his independence extends to every person in his house. All these persons are so attached to him, that they follow his fate; they depend immediately upon him; he is bound to protect them; and any outrage or insult offered to them is an outrage or insult offered to him. If the domestics and whole family of a foreign minister did not depend exclusively and entirely upon him, it may be conceived with what facility he might be molested and disturbed in the discharge of his functions. These principles are now universally recognised. (Vattel, liv. iv. sec. 120.)

§ 34. Among the persons belonging to a public minister's suite, Secretaries of Embassy, or of Legation, must be considered as the most distinguished; they hold their commissions immediately from their sovereign, who nominates them only to ministers of the first and second rank (rarely to those of the third rank). They are, in fact, a species of public minister; and, independently of their attachment to an ambassador's suite, they enjoy in their own name and right the same protection of the law of nations, and the same immunities, as he does. But the *private secretaries* of a public minister must not be confounded with the secretaries of embassy or of legation; for they enjoy no more than the privileges granted to all persons in such minister's suite, in whose private affairs they are employed.

The functions of secretaries of legation consist in their being employed by their minister for objects of ceremony, or in making verbal reports to the Secretary of State, or other foreign ministers; in taking care of the archives of the mission; in ciphering and deciphering despatches; sometimes in making rough drafts of the notes or letters which the minister is in the habit of writing to his colleagues, or rather to the local authorities; in drawing up procès verbaux; in delivering passports, and presenting them for the minister's signature, after the principal secretary has countersigned them; and, finally, in assisting the minister, under whose orders they are placed, in everything concerning the affairs of the mission. In case a minister is prevented, the secretary of embassy or of legation is employed, and admitted to conferences, *and to present notes signed by the minister; but it is not settled whether such [*105]

secretary is entitled to be admitted to all the functions of a minister, even when he has previously been legitimated as a Chargé d' Affaires.

Counsellors of Embassy or of Legation, who are attached to diplomatic missions, not having the title of Minister at the same time, cannot claim the same diplomatic ceremonial which is enjoyed by the secretaries of embassy, or of legation of the first class.

§ 35. It is only since the seventh century, when permanent missions became more frequent, that the *wives* of ministers have followed their husbands into foreign Courts, and the title of Ambassadresses has been introduced. The wife of a public minister participates not only in his independence and inviolability, but also receives the same distinguished honors, which cannot be refused to her without a deficiency in the respect due to her husband. The ceremonial relative to the wives of ambassadors is regulated in most Courts. The consideration which is due to an ambassador is also reflected on his children; who, in like manner, participate in his privileges and immunities. (Vattel, liv. iv. sec. 121; Martens, Manuel de Diplom. sec. 46; Moser, l'Ambassadrice et ses Droits.)

§ 36. Besides the secretaries of embassy or of legation, it also happens that Governments attach to missions, especially to those of the first class, a director of the chancery; a secretary-interpreter; a chaplain (sometimes called an almoner); and on very rare occasions (such as the demanding a princess in marriage) pages, to accompany the ambassadors. Physicians, private secretaries, officers of the household, and livery servants, who are employed only in the private service of a minister, enjoy the special protection of the law of nations, as belonging to his suite, and consequently are not subject to the laws and jurisdiction of the country to which he is accredited. (Bynkershoek, ch. xv.) In many countries it is usual to invite foreign ministers, to send, immediately after their arrival, to the Secretary or Minister of State for Foreign Affairs, lists of the persons attached to their suite, and even to indicate the changes which may take place during their mission.

§ 37. Although the correspondence of Governments with their diplomatic agents in foreign countries takes place under the protection of the law of nations, yet on many occasions the interest of Governments requires the frequent transmission of intelligence or orders to them, by a safer and more speedy mode of conveyance than that afforded by the ordinary post, in which case they employ Couriers.

In *time of peace*, the persons and the despatches of couriers are alike inviolable; any violence committed against them is regarded *as a [*106] manifest infraction of the law of nations, whether it be committed in the territory of the Power to which the courier was going, or in that of a third Power, which he was in the act of crossing. But this privilege does not prevent the seizure of a courier's papers, on urgent occasions, when a foreign minister has himself violated the law of nations, by forming or favoring dangerous plots or conspiracies against the State, in order to detect them, and to discover his accomplices; because in such case an ambassador may himself be arrested and interrogated. (Vattel, liv. iv. sec. 99, 123.) In order that a courier may be enabled to claim this in-

violability, he must be legitimated by external marks, such as a plate attached to his clothes, or passports formally drawn up and delivered by a competent and recognized authority. In order to facilitate and accelerate the course of couriers many Governments exempt their carriages from being *visited* on the frontiers: this practice, however, is not general, and those packets only which exhibit an *official seal* are not subjected to examination.

In *time of war*, where no arrangement has been concluded relative to the safety of the couriers of an enemy, or of his allies, Governments consider themselves authorized to cause couriers to be arrested, and their despatches to be seized; hence, on the first overtures towards reconciliation, both parties instantly assure each other of the free passage of their respective couriers.

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*Section V. [*107]

OF THE DIPLOMATIC CEREMONIAL.

§ 38. The honors due to ambassadors are matters of pure institution and custom: they have a right to those civilities and distinctions, which custom and manners destine to mark the consideration which becomes the representative of a sovereign. When a custom is so established that it gives a real value to things in themselves indifferent, and a constant signification according to manners and usages, the natural and necessary law of nations is obligatory with regard to such institutions and requires that we should conduct ourselves, with reference to these things, in the same manner as if they actually had the value which men have attached to them. For instance, by the usage of all Europe, an ambassador enjoys the peculiar privilege of being covered before the prince to whom he is sent; this right indicates that he is recognized as the representative of a sovereign. To refuse it to the ambassador of a truly independent State is, therefore, to injure that State, and in some degree to degrade it. (Vattel, liv. iv. sec. 79.)

In everything which concens the diplomatic Ceremonial, the *conventional* or *customary* law of nations requires that nothing be established which can wound the public character of a diplomatic agent or affect his privileges. Though it belongs to sovereigns to determine the *degree* of honor and of distinctions which they will grant to foreign ministers, yet great circumspection is necessary on their parts, because the *respect* shown to such ministers is considered as shown to the sovereigns and nations by whom they are sent; and whatever may wound them is considered as a want of respect, and, according to circumstances, even as an injury. Hence sovereigns in general carefully avoid exceptions and preferences, unless they have real grounds for making them. The two most essential and delicate points of the diplomatic ceremonial are *rank* and *qualifications*.

The usage followed in each Court is, and must be, the guide in this respect. There is, however, an important distinction to be made on the subject of ceremonial. Where it concerns the Court itself at which a minister resides, such Court is responsible for everything done, or which a minister may have experienced, contrary to the customary ceremonial. On the contrary, [*108] where the ceremonial refers to ministers among *themselves, as when it respects their rank, &c.; in this case a Court has no right to interfere, and indeed prudence forbids it to make any interference. The following paragraphs will exhibit a sketch of the principles at present acknowledged by most of the European Courts.

§ 39. Whatever may be the rank of a diplomatic agent who is sent to any foreign Court, his first duty on his arrival is to notify it, or cause it to be notified, to the Minister of Foreign Affairs.

If such agent be of the *first class*, this notification is made either by the Secretary of Embassy or of Legation, or rather by a gentleman attached to the omission, who is then charged to deliver a copy of the credentials to the head of the foreign department; at the same time asking on what day and hour the minister may be admitted to a public audience of the sovereign. Very frequently, however, the ceremonial of each Court and the rank of the minister arriving decide, whether he is to wait for, or to make his first visit to, the Secretary of State, or Minister for Foreign Affairs.

The arrival of ministers of the *second class* may be announced in the way above noticed; but, more generally, both they and ministers of the third class (who ordinarily have neither Secretary of Legation nor gentlemen attached to their mission) confine themselves to a *written notification* of their arrival, requesting the Minister of Foreign Affairs to be pleased to take the sovereign's commands respecting the delivery of their credentials.

Chargés d'Affaires, who are only accredited to the Minister for Foreign Affairs, in like manner notify their arrival in writing requesting him to fix an hour when they may deliver their credentials to him.

After the *formal notification* of a diplomatic minister's arrival, and after the Minister for Foreign Affairs has paid him the usual complimentary visit, he is admitted to an audience of the sovereign; which may be either public or private, according as the two sovereigns may wish. A public audience ushers an ambassador into his office, though it is not absolutely necessary to his entering upon his functions; frequently he is only admitted to a private audience, or both his solemn entry (which is now confined to Turkish ambassadors,) and his public audiences are deferred to a future day. Public audiences are given with great splendor, the ceremonial of which, together with the form of visits of etiquette, and the rank which the several classes of diplomatic agents are to hold, are described at considerable length by Wicquefort, (L'Ambassadeur, liv. i. ch. xviii.–xxii.,) and by Martens (Manuel Diplomatique, sec. 34–40.) Ministers of the second order are seldom admitted to public audiences; private audiences are given with less regard to strict ceremonial.

§ 40. Since the negotiations for the peace of Westphalia, the title of Ex-

cellency, which was anciently given to emperors, kings, *and sovereign princes, has been exclusively given to ambassadors, by whom it is enjoyed to this day. Every minister of the first class has a right to require it of every person with whom he treats, whether vivâ voce or in writing, except the sovereign to whose Court he is accredited; this title is also given in some Courts, but only by courtesy, to ministers of the second class, especially those of the great Powers. [*109]

Before the establishment of permanent missions, it was usual to render the same honors to ambassadors, with which their respective sovereigns would have been received, on their arrival and departure, even in territories and towns which they only crossed when travelling. At present, however, they are seldom received with public honors, excepting ambassadors from the Porte; they travel through towns and cities without any bustle or pomp.

No diplomatic agent can claim any greater honors and immunities at the Court wherein he resides, than those given to his colleagues of the same class with himself. Very frequently the great Courts give less to ministers of the second class, than the middling and petty Courts (especially those of Germany) sometimes give to those of the third class, particularly to ministers sent by Powers of the first order.

It is a custom now generally established among all the European Courts, to reserve for the Corps Diplomatique the next places to those appropriated to the royal family, at grand fêtes or public solemnities. All ministers, without any distinction, are at present invited or admitted to Court fêtes; and in many countries, this privilege is also extended to Secretaries of Embassy and of Legation.

§ 41. It is usual at almost all Courts, especially when a minister has resided there for many years, or has successfully terminated the negotiation with which he was charged, to the satisfaction of all parties concerned, to make him *Presents* on his departure, and sometimes also, though very rarely, on his arrival. (On this subject, consult the Memoirs et Negotiations du Chevalier d'Eon, p. 96.) Presents are sometimes also made to the Ambassador's wife, and to the Secretary of Legation. All such presents, the ministers may accept; but if a foreign sovereign thinks proper to confer any of his *orders* upon them, ministers cannot wear the decorations of such orders without the special permission of their own prince.

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*Section VI. [*110]

OF THE DUTIES AND THE FUNCTIONS OF A DIPLOMATIC AGENT.

§ 42. The nomination of a diplomatic agent to an employ, fixes the objects of his application and of his labors; and his first duty ought to

be, the acquiring of a perfect knowledge of the affairs with which he is charged. Independently of the instructions (§ 16, p. 96, supra) given to him, if he finds a negotiation already broken off, he ought, by reading the correspondence of his predecessor, to inform himself of the origin and progress of such negotiation; of the obstacles which it has encountered; and in what manner they have been wholly, or in part, obviated. This reading will make known to him the persons who have been engaged therein, as well as those who have most effectually promoted it; the means by which they have succeeded, and from what quarters he may derive success; and, lastly, he ought to endeavor to form a judgment respecting the talents of those with whom he has to negotiate.

The general duties of a diplomatic agent consist in maintaining a good understanding between the two governments, where it already exists, and in restoring it by every means he can suggest, where it is interrupted; in delivering the letters of his Sovereign or Government to the king or State at whose Court he resides, and in soliciting an answer thereto; in observing all that passes at the Court wherein he negotiates; and in protecting the subjects, and in preserving the interests of his master. When his interference in behalf of his sovereign's subjects is necessary, his instructions will determine whether he is to act in their behalf *officially*, or only by recommendation. (Wicquefort, L'Ambassadeur, liv. ii. ch. i.; Martens, Manuel Diplomatique, sec. 49.)

§ 43. Negotiations concerning State affairs are of two kinds, viz., either *simple communications*, or *Negotiations, properly so called*, whether for removing differences between Governments, or for proposing conventions or treaties. The latter are here intended.

A diplomatic agent may conduct negotiations either *immediately* with the sovereign to whom he is accredited, or with the *Minister* or *Secretary of State for Foreign Affairs*. The last mentioned *chan-
[*111] nel is at present most generally followed, and in protracted affairs it is is some degree indispensable. Negotiations properly so called, may also take place, either *directly* between ministers, commissioners, or deputies, nominated expressly for this purpose by the two Governments, or through the intervention of one or more third Powers or mediators, who in that case charge their representatives to treat with the two litigating parties. (Wicquefort, liv. ii. ch. ii.; Martens, sec. 50.)

§ 44. All the communications, whether direct or indirect, to which negotiations may give rise, are carried on either vivâ voce in conferences (for which see § 47, p. 112, infra,) or in writing by means of memorials or letters mutually interchanged by the negotiating agents.

In *extraordinary* missions, it sometimes happens that a diplomatic agent in the letter customarily addressed to the Minister for Foreign Affairs, to notify his arrival, and to communicate his credentials, apprises the latter of the motives and objects of his mission, but in general terms only, as well as of the powers which he has received from his Court to enter into negotiation. If such agent's instructions do not bear at all, or at least, not with sufficient precision, upon the subject of the treaty which he is commissioned to make with the Government to which he is accredited, he must commence by notifying to the latter that, in order that he

may be able to enter into discussions upon the subject in question, he is about to ask his sovereign's orders: nor, until he has received them, does he break off the negotiation, by addressing to the local Government the decisions or propositions which he is charged to communicate to it.

A diplomatic agent, in entering upon a negotiation, ought constantly to have present to his mind the system of rights and interests of his constituent, and also this principle, viz., that in affairs of positive discussion Governments alone negotiate, and that diplomatic agents are merely their organs, charged only with the interpreting of doubtful points, or with pleading the justice of the decisions formed by the Government, and with the most efficacious means of securing their success. In complex affairs a negotiator ought to have the talent of knowing how to choose the proper manner of treating them, viz., how and when he ought to concede a point; to contest it until he has obtained advantages proportioned to it in the way of compensation; not to separate matters so that the person with whom he is negotiating may derive any advantage from such separation; to embrace every object; not to cede any territory unless he can acquire some elsewhere. Such are the difficulties with which a negotiator has to contend, especially when the subject of the negotiation is a treaty of peace, which comprises so many different interests. (Wicquefort, liv. ii. ch. iii.; Martens, sec. 51.)

*§ 45. When a negotiation is carried on in writing, the diplomatic agents who are charged with it address to each other Letters or Notes, and Memorials, both in their own name and in that of their respective sovereigns. [*112] Where an affair has continued a long time without any reply, in order to avoid the appearance of an urgency which the affair perhaps does not require, and, on the other hand, not to afford any ground for supposing that it is forgotten, or that there is no intention of prosecuting it any further, in such cases diplomatic agents sometimes transmit a kind of memorandum or note not signed, relative to the affair in question, which is termed a Verbal Note. If no answer can be given respecting the affair, the minister to whom the note is transmitted answers them provisionally by a note of the same nature.

§ 46. The word *Ultimatum* generally means the result of a negotiation, and it comprises the final determination of the parties concerned in the object in dispute. None but the sovereign himself, on becoming acquainted with the progress of a negotiation, can give his representative sufficient power to determine finally, in cases where the great interests of States are concerned.

§ 47. By means of verbal explanations, to which Diplomatic Conferences give rise, the progress of an affair is accelerated, various difficulties and delays are obviated, and diplomatic instruments are prepared and facilitated. It frequently happens previously to fixing a conference, that a minister is required to indicate its object in writing, or rather, after the first sitting, he issues in writing his advice or opinion on the object which has been discussed, or the substance of what he may have said in conference, or also a *procès verbal* or *protocol* which has been drawn up respecting it.

Every written explanation given at a conference, which is to be con-

sidered as an official and obligatory notification, ought to be signed; which formality, however, is not required for what is to serve only as a previous and *non-obligatory* explication. In general, a diplomatic agent ought to be extremely circumspect in communications in writing, lest he should commit himself and be obliged to disavow it. To prevent this two-fold inconvenience it will be prudent for him not to express himself in writing, unless he has express orders so to do. When, indeed, he thoroughly understands the views and intentions of his cabinet, and when the particulars to be communicated require precision, he may give a verbal note, or a minute of conversation, or even a confidential note: none of these require to be signed, and as they are considered as being given only to assist the memory, nothing can be concluded from them. According to this principle, a diplomatic agent must judge when he may be bound to affix his signature and when he has a right to refuse it.

[*113] It is not usual to sign memorials, notes, or declarations of *Courts, to which the necessary authenticity is given by the letter or note with which a minister accompanies them.

Diplomatic conferences afford full scope for the development of a negotiator's talents, by the manner in which he gives his opinion, and makes his objections to the propositions advanced. The *tone* adopted by a minister in negotiating contributes much to the success of an affair; for the most unexceptionable objection, unless it be offered with circumspection, will always displease; and a diplomatic agent will afterwards find it difficult to procure the adoption of his opinion by those with whom he has to treat.

§ 48. It frequently happens that several powers nominate plenipotentiaries to meet in Congress, either for the termination of a war by a general pacification, or for the amicable adjustment of existing differences. Where a pacification is the object of a congress, the opening of it ought to be preceded by a truce or suspension of arms, in order that the safety, liberty, and tranquillity of the diplomatic agents sent thither may be secured.

When the place of meeting is agreed upon, the powers principally concerned begin by sending their plenipotentiaries; other powers, which are not principals, frequently send also diplomatic agents provided with full powers either to participate, in the proposed treaty, or merely to watch over their interests, and see that nothing be stipulated to their disadvantage, or contrary to their rights or claims. The choice of a spot or house, where the conferences are to be held, is a matter of common agreement among the parties interested. Sometimes it is the residence of the minister-mediator, or of him who is to preside at such conferences; sometimes, the residence of any other minister, or even a third place chosen for this purpose. Formerly, much time—months and even years—was wasted in idle preliminary discussions respecting the ceremonial, rank, precedency, visits of etiquette, &c.; but since the congresses held at Utrecht, in 1713, and at Aix-la-Chapelle, in 1748, when the frivolity of such disputes was recognized, these trifling punctilios have been disregarded. The following is the mode of holding congresses now in use.

At the first meeting the plenipotentiaries exchange and examine their

respective full powers. If the negotiation take place under the mediation of a third power, the minister-mediator, or the presiding minister, as the case may be, first produces his powers, and he is followed by the rest. When they are all recognised to be in due form, the presiding minister usually pronounces a discourse suited to the occasion, in which he states the subject of the congress and his sovereign's intentions; his example is followed by the other ministers, who reply in similar discourses. When all the preliminary discussions and arrangements are made, the plenipotentiaries enter into conference, they propose, transact affairs, *and negotiate; and as the multiplicity of affairs occasioned by such [*114] negotiations renders it necessary to have protocols drawn up at the conclusion of each conference, these are signed by the plenipotentiaries concerned, who usually send copies of them to their respective cabinets.

§ 49. It is not sufficient that a diplomatic agent should know only how to conduct his sovereign's interests in a foreign Court, he must also give an exact and faithful account of everything that passes, both with respect to the negotiations confided to him, and also with regard to any other affairs which may happen during his residence there, and which may be of any importance to his Government. Of this duty a minister acquits himself in the Reports or Despatches which he sends to his Court. Perspicuity and the most rigid regard to truth are indispensable requisites to these communications, in which the statements relative to negotiations, must be kept entirely distinct from reports concerning other particular affairs with which he may be charged. A diplomatic minister cannot be too reserved in writing news, whether general or particular: he ought to be very punctual in transmitting whatever comes to his knowledge, but he ought to distinguish what is doubtful from what is true and certain, lest by mingling the false with the true, the falsity of one should destroy the credit due to the other. He ought to exercise still more reserve in communicating his opinion on the state of affairs, and particularly respecting the success of his negotiations, whatever assurances he may receive concerning it. (Wicquefort, liv. ii. ch. x.; Martens, Manuel, sec. 57.)

§ 50. The language to be employed in diplomatic communications has frequently given rise to serious and sometimes puerile discussions. As all sovereign States enjoy a mutual independence and natural equality, each of them has an indisputable right in diplomatic relations to employ the language in use in his own country, or some foreign language mutually agreed upon. In order, however, to avoid the difficulties and inconveniences which would result, and which in former ages actually resulted, from the exercise of this claim, recourse is had to *neutral* language. Previously to the eighteenth century the Latin language was used for this purpose; and it is only since the reign of Louis XIV., when French became the language of society in almost all the great Courts of Europe, that this language has been substituted for Latin in diplomatic negotiations and treaties. Where the parties concerned cannot agree in the choice of a *third* language, each persisting in using his own, both in negotiations and also in the drawing up of treaties, two original copies are made of the latter. As the Ottoman Porte considers those treaties only

to be binding which are expressed in the Turkish language, and the [*115] *European powers will not allow that language to be used towards them, the treaties concluded between them and the Porte are most commonly despatched in several languages.

At the Congress of Vienna, all affairs, with the exception of such as exclusively related to the interest of the States of Germany, were discusssed in French. In the sitting of June 12th, 1817, the Diet of the Germanic Confederation at Frankfort decreed, that for its foreign relations the German language only should be employed; a French or Latin translation being added in parallel pages whenever it should be desired. But this mode of conducting political affairs renders negotiations both longer and more difficult, and cannot fail to produce real inconveniences with reference to the clearness and precision of the treaties themselves. Although it seems natural that, between Governments whose State language is the same, such language should be used in preference to any other, still the French language has of late years most frequently prevailed, especially among the States of Germany.

§ 51. Although, as it has already been remarked, the precise line of conduct which a diplomatic agent is bound to follow is often laid down in his instructions, yet there are cases in which the orders he has received are such, that the execution of them would produce effects opposed to his sovereign's views, and the consequences then resulting would evidently be contrary to his master's interests. In such cases, supposing a diplomatic agent to be thoroughly penetrated with the object of his commission, he would be completely convinced that a literal obedience of his orders would lead him aside from that object, and he would, perhaps ought, to take upon himself to suspend the execution of those orders, seizing the earliest opportunity of apprising his Court of his conduct, and of justifying it by stating his motives and reasons for so doing.

But though there are cases in which a diplomatic agent may deviate from his instructions, it is very difficult to determine those in which he may and even ought to act without orders, since it is impossible to admit that a diplomatic agent is allowed to commit his sovereign for any measure without his knowledge. As it is extremely difficult for any such agent to have certain data relative to the political position and interests of his sovereign, in relation to other powers, it is most prudent that he should hazard nothing, and frankly declare that he has no orders, rather than incur the danger of being mistaken, and thus compromising the interests, dignity, and views of his cabinet, and finally, rather than expose himself to be disavowed by his sovereign, or by the States, whose interests he was charged to maintain and defend.

*Section VII. [*116]

OF THE TERMINATION OF A DIPLOMATIC MISSION.

§ 52. The functions of a minister, who is accredited to a court, cease in the following manner:—

1. When the term expires, which had been fixed for the continuance of his mission, and also when he has only been appointed minister ad interim, on the arrival or return of the ordinary minister. When a minister is expressly accredited only ad interim or for a limited time, the arrival or return of the ordinary minister in the former case, and the lapse of time fixed in the latter case, respectively cause his credentials to expire, and it is not essential that such minister should be *formally* recalled. (See, in the Lettres, Mémoires, et Negotiations du Chevalier d'Eon, an account of the dispute which took place at London between that minister and the minister in ordinary, Count Guerchy.)

2. When the *object* of the mission is fulfilled, as is the case in missions of pure ceremony, and also those which have for their object any negotiation whatever.

3. By the *recall* of a minister by his sovereign.

4. By the *death* of a minister.

5. By the *death* of the sovereign to whom he was accredited. It is now generally received as a principle in all European Courts, that after the decease of his own sovereign, or of him to whom he was accredited, a minister is obliged to produce new Credentials or Full Powers, in order that the negotiations may be continued with him.

6. By the *death* or *abdication* of his constituent.

7. When a minister has demanded and obtained his dismission from his sovereign, or is called by the latter to *other* functions.

8. When a minister on account of a violation of the law of nations, or of important events which have happened during his negotiations, &c., *of his own accord* declares, either expressly or tacitly, that his mission must be considered as terminated.

9. When a minister is sent away by the Government to which he is accredited.

When, in consequence of unforeseen events, it happens that a minister is suspended from his functions, he continues to enjoy the exterritoriality or inviolability of his public character; and, *on the termination of a mission in any way whatever, he has a right to the privilege attached to that character *for the whole of the time* which is necessary for his return to his own country. [*117]

10. Lastly by the temporary change which a minister may experience in the diplomatic rank which he holds; as when an envoy is charged to present a letter of credence as an ambassador, or when he quits the character of an envoy extraordinary, or of an ambassador, to continue his diplomatic functions as a minister of the second or third order. In these

cases such minister at an audience, presents both his letter of recall and his letter of credence; after which he ceases to enjoy those distinctions which were only attached to the high character he had temporarily filled.

§ 53. When a minister has solicited and obtained, through the Minister of Foreign Affairs (to whom he at the same time transmits a copy of his letter of recall,) an audience to take leave of a sovereign, he presents to the latter the *original* letter of recall which he has received from his own king. This audience of leave may be either public or private, according as the sovereigns have agreed; and on presenting such letter, the minister addresses a discourse or compliments suited to the actual situation of affairs at the moment of his departure, and to the relations subsisting between the two Courts. This last function of his office being performed, the minister makes his visits of leave to the foreign ministers resident at the same Court.

If a minister be *absent*, from indisposition or other unavoidable cause, when he receives his recall, and if this has not been sent to him in consequence of misunderstanding, it is now settled that he may take leave of the sovereign to whom he has been accredited *in writing* (which of course is in substance the same as a discourse on taking leave,) at the same time transmitting the letter of recall.

In both these cases the sovereign, or head of the Government, causes the Secretary of State to deliver to the minister who is taking his departure his Letter of Recredentials, as well as the ordinary or extraordinary presents usual in such cases, together with his passports. This letter of recredentials is addressed to the minister's sovereign, in reply to that of recall, and the sentiments expressed in it answer to those in the letter received, and to the situation of affairs; in this letter, moreover, which contains a testimony of his particular satisfaction at the minister's conduct during the period of his diplomatic residence, he requests the prince to whom it is addressed to give entire credence to everything which such minister, on his return, may say respecting his sincere desire to maintain and to strengthen the good understanding and union established between the two Courts.

In case a minister is recalled, in consequence of differences which may [*118] have arisen between the two Governments, circumstances *alone must decide whether a letter of recall is to be sent to him, or whether he is authorised to quit his residence without waiting for such letter, or may demand an audience of leave; or whether this is to be granted to him, and finally whether any presents are to be offered to him, or may be accepted by him.

Where the minister, who succeeds one that is recalled, arrives before the departure of the latter, or if a Chargé d'Affaires be nominated in the interim, the minister who is on the point of departing presents him to the sovereign at his audience of leave, when the usages of the Court where he is, do not forbid it.

§ 54. When a minister dies in a country where he has resided in a diplomatic capacity, his constituent, as well as the family of the deceased, may require his remains to be honored with a *suitable* burial. The laws of the country wherein the deceased actually was at the time of his death,

as well as those of the church to which he belonged, decide upon the *place* where his remains are to be deposited, and whether he is entitled to a funeral procession or not. The family of the deceased may, however, transport his embalmed body out of the country into the States of the sovereign his master.

§ 55. It is the duty of the Secretary of Embassy or of Legation (unless there be a second minister of the same Power, accredited to the same Court) to put seals upon, and to draw up an inventory of, the real and personal effects of a deceased minister, or to cause such an inventory to be drawn up. If a minister or Chargé d'Affaires die without leaving any secretary of legation, the inventory is drawn up by the minister of some allied Court, who, having collected the *archives* under one key, affixes the seals of his legation upon it, in concert with some minister whom he has engaged to assist him, and who also affixes the seal of his legation. A procès verbal of the transaction is then drawn up, and delivered to the successor of the deceased minister.

§ 56. Although the death of a minister terminates his diplomatic mission, together with all the rights and privileges attached *to his person* (with the exception of the free removal of his effects which are exempted from all dues whatsoever,) yet it is now the established custom to allow his widow and family, as well as the persons belonging to his suite, the full enjoyment, for a limited time, of all the privileges and advantages enjoyed by such minister during his life. It belongs, however, to the Government, to which he was accredited, to fix that time; which, being once past, they are brought under the jurisdiction of the country.

§ 57. All the property, real and personal, of a deceased minister is subject to the laws of the country in which it is situated; and, according to those laws, the requisite formalities for succeeding to the possession thereof must be regulated, whether that succession be under an intestacy, or by will.

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*Section VIII. [*119]

OF DIPLOMATIC COMPOSITIONS.

§ 58. Diplomatic compositions may be divided into two classes, viz:—

1. *Public Acts*, strictly so called. Such are *Manifestoes, Proclamations, Exposés* of motives which emanate from a government and are addressed either to its subjects or to nations generally, either for the purpose of maintaining and demonstrating some right, or of evidencing obligations contracted by antecedent acts or by ancient local or general usages; or for the purpose of conceding rights or of acceding to claims. Of this

description also are *Treaties of Peace* and other treaties, *Conventions, Acts of Cession, Renunciation, Guaranty, &c.*

2. *Acts* addressed to one or more Powers, to foreign sovereigns, or their ministers and diplomatic agents, or also the ministers of the Government by which the diplomatic pieces in question have been issued. To this class belong *Instructions, Full Powers, Credentials, Memorials, Diplomatic Notes, Ultimatums,* and any other documents to which negotiations may give rise.

As many of these instruments have already been noticed, it only remains to offer a few remarks on such of them as have not been mentioned, and which from their importance, are deserving of special consideration.

(1.) By *Manifestoes* are understood the declarations issued by Sovereigns or Governments at the commencement of a war, or when they adopt any rigorous measures. These documents usually contain a declaration of war, together with reasons to justify them in taking up arms; they are also designed to inform revolted subjects of their true interests, and to recall them to their duties. In short, manifestoes usually contain all those details, which may authentically prove the rights or the complaints of the Sovereigns or States from whom they have emanated.

(2.) *Preliminaries of Peace* are the first sketch of a treaty and contain the principal articles on which both parties are desirous of concluding, and which are to serve as the bases of such treaty. Preliminaries are agreed upon, when the objects to be regulated are numerous and complicated, or when several Powers have been engaged in the same war, or when the absolute need of peace produces in either party a desire to put a speedy termination *to hostilities. As preliminaries must be signed by the plenipotentiaries charged with the negotiation, the instructions and orders which they have received from their respective Governments while such negotiation was in progress, must be their guide in determining how far they may proceed with respect to essential conditions or stipulations. Whatever is only *accessory*, is in like manner agreed upon and rectified in common, when the treaty is definitely drawn up.

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(3.) Express Conventions made between nation and nation are called *Public Treaties:* the principal are *Treaties of Peace*, of *Commerce*, of *Alliance, offensive and defensive*, of *Guaranty*, of *Exchange*, of *Limits*, of *Cession*, of *Restitution*, of *Subsidy*, of *Alliance by Marriage, &c.* The *Holy Alliance*, concluded at Paris on the 26th of September, 1815, between the sovereigns of Russia, Austria, and Prussia, in person, presents an instance of a public treaty concluded and signed without the participation of diplomatic agents. To that alliance most of the States and sovereigns of Europe subsequently acceded: his Britannic Majesty George IV., when prince regent, declined to accede to it, not on account of principles expressed by the august sovereigns who signed that treaty, but because "the forms of the British constitution, which he was called upon to maintain in the name and in the place of the king his father, prevented him, in the form in which it was laid before him."

As the *validity* of a treaty depends essentially on the *mutual consent* of both parties, whoever signs such an act in the name of a State, must have been sufficiently authorized to treat by the latter. The constitution of every State determines to *what point* the execution of treaties concluded upon, whether by the supreme council, or by the president or senate in republics, is obligatory on the nations whom those treaties concern. (On this subject see the works of Grotius, de Jure Belli ac Pacis; Vattel, Droit des Gens; and Martens, Précis du Droit des Gens Moderne de l' Europe.)

The engagements, which may be made by the diplomatic representative of a Sovereign or State beyond the limits of the authority confided to him, are nothing more than simple *promises*, by which he engages to employ his good offices to procure the ratification of such promise by the State or Sovereign which charged him with negotiating. By the *universal law of nations* every engagement entered into by any diplomatic agent whomsoever (provided he confines himself within the limits of the powers given to him,) and upon the *faith* of which powers a foreign nation has entered into a negotiation with him, is obligatory upon the State by which he was authorized, even though he should have deviated from his secret instructions. But the *positive law of nations*, considering the necessity of giving very extensive full *powers to negotiators, [*121] has rendered a special ratification necessary, in order that a State may not be exposed to irreparable injury from the inadvertence or inexperience of a diplomatic agent. Hence, in modern times, those treaties only are considered obligatory which have been duly ratified: but such as are signed immediately by sovereigns themselves (as was the case in the Holy Alliance) require no ratification.

In drawing up treaties of peace, the following particulars ought carefully to be attended to, viz.: The *preamble* should be a brief and faithful historical recital of the motives of the treaty; it also determines the principles and intentions of the contracting parties. The various *subject matters* ought to be most particularly distinguished, lest engagements of a widely different extent should be thought to bear upon one and the same object. In treaties, as in all conventions, *general* engagements precede *particular* engagements; and it is only in consequence of the former, that they enter, article by article, into a detail of the means agreed upon in order to secure their exact and scrupulous execution. These articles may either be inserted in the principal act, or be annexed to it in the form of an additional convention, or of separate or additional articles.

When the publication or execution of a tre.ty remains suspended for some time, it is called a *secret* treaty; sometimes also a few articles only, which are added to the principal treaty, remain secret. Those treaties or conventions, the execution of which depends on the happening of some contingent event, are termed *eventual treaties*.

The articles cannot be expressed with too great precision and clearness, in order that each of the two contracting parties may perfectly know the extent of his obligations, and what he has to expect from the other, in certain foreseen cases. Hence, it is indispensably necessary, that a min-

ister engaged in negotiations should be thoroughly acquainted with the language in which the treaty is drawn up; otherwise the most serious misinterpretations must be made, which have not unfrequently led to ruptures between the contracting parties.

(4.) When the ministers of two powers, which are of equal rank, sign a treaty, it is usual to make two originals or a double instrument; each nominates his own sovereign first in the copy which he keeps, and signs first, in order that there may be no prejudice to their claims of rank when this is contested. Where several powers are parties to a treaty, the signatures are now made (that is, since the Congress of Vienna in 1815) according to the *alphabetical* order of power, without any regard to rank; though in certain cases recourse is had to the *lot* to determine the order of signature. Where there is a minister-mediator, his signature is ordinarily placed first.

[*122] *(5.) Although diplomatic agents, who are charged with the negotiation of a treaty of peace, or of a convention, are, by virtue of their full powers, authorized to conclude and to sign treaties, yet this is not done, without adding a clause for their ratification. The act of ratification consists in a writing signed by the sovereign and sealed with his seal, by which he not only declares his approbation of the entire treaty concluded in his name by his minister, but also promises bonâ fide to perform it in all its points. The ministers of the respective contracting parties afterwards exchange these ratifications at a time fixed by them; and when a power has acted as a mediator, these exchanges are ordinarily made by the hands of the minister of that power. Until these exchanges of ratification have been made, no treaty or convention becomes obligatory. The commencement, however, is dated from the day of the signature, unless it be otherwise expressly stipulated.

(6.) A convention, by which one power promises to succor another in case the latter should be injured in the exercise of certain rights by a third power is called a Guaranty. If such convention guarantees in general terms against all injury of any rights, it becomes an alliance. (See, on this topic, Neyron's Essai Hist. et Polit. sur les Guaranties en General, &c., Gottingue, 1777; Vattel's Droit des Nations, liv. ii. sec. 235–261.) A guaranty may be admitted as a means of safety in every obligation existing between two or more States, with the exception, however, of the guarantee. In this way, territorial possessions, the constitution of a State, the right of succession to a throne, &c., may be guaranteed. A guaranty may be made either to the power whose rights it is intended to secure, or to a *third* power in favor of the latter. When the inviolability of a treaty is to be secured by means of a guaranty, this always forms an accessory treaty, notwithstanding it may form part of the principal act of the treaty. A guaranty may be made not only by a third power, but also by one of the contracting parties in favor of another, or in favor of some of the contracting parties, which always supposes a treaty concluded between two or more powers; in this last case the guaranty is either unilateral or reciprocal. It was reciprocal between Prussia and Austria by the eighth article of the treaty of peace, concluded at

Dresden in 1745; and also between France and Russia, which powers, by the twenty-fifth article of the treaty, concluded at Tilsit in 1807, mutually guaranteed their respective territories, as well as the territories of the powers comprised in that treaty. An unilateral guaranty on the part of France took place with regard to the integrity of the Austrian States, at the peace of Vienna in 1809, Art. 14.

A guaranty may also be general, when it refers to all the rights, possessions, or stipulations contained in a treaty; or special, when it refers only to a part of such rights, possessions, or *stipulations. In both cases, however, it ought on no account to prejudice the [*123] rights of a *third* power,—salvo jure tertii. (Vattel, liv. ii. ch. xvi. p. 238.)

(7.) An act of Protestation is a declaration made by a sovereign, or by his minister, against the oppression or violence of any authority whatever of a Government, or against the declared *nullity*, or the attacked *validity* of a proceeding or of an entire public act. The protestation against what has been, or what shall be done to the prejudice of the party whose interests are maintained, can neither injure nor prejudice the rights of him who is charged with the making of it. A public minister, in whose hands a protestation has been placed, can only receive it ad referendum, in order that he may demand instructions against the protestation itself.

(8.) According to the public law, an Act of Renunciation is a species of renunciation of the sovereignty or the exercise of any power, which a Government or sovereign can no longer retain without derogating from the fundamental principles of the constitution of a State. An Act of Cession is a declaration by which a sovereign renounces his rights of sovereignty over a country in favor of another person.

(9.) Under the appellation of Reversal is understood:

1. The declaration, by which a sovereign promises that he will observe a certain order, or certain conditions, which have been once established, notwithstanding any changes that may happen to cause a deviation therefrom. Thus, the Court of Versailles, when it consented for the first time, in the year 1745, to grant the title of Empress to the Czarina Elizabeth, exacted of her a *reversal*, or declaration purporting that the assumption of the title of an Imperial Government, by Russia, should not derogate from the rank which France had held towards her, and that upon this condition only the latter power consented to grant to the sovereigns of Russia the quality and title of emperor.

2. Those letters are also termed Reversals, Litteræ Reversales, by which a sovereign declares that, by a particular act of his, he does not mean to prejudice the *right of a third power*. Thus, formerly, the Emperor of Germany, whose coronation ought, according to the golden bull, to be solemnised at Aix-la-Chapelle, gave to that city, when he was crowned elsewhere, *reversals*, by which he declared that such coronation took place *without prejudice to its rights, and without drawing any consequence therefrom for the future.*

(10.) When affairs of State occur which are of too great extent and importance to be set forth in an ordinary memoir, it is usual to draw up

[*124] *deductions or confidential memoirs,*[1] in order to be *presented at a conference, or for the purpose of being made public. They are designed to explain a principle of the law of nations, and to prove the justice or injustice of a claim, or of an undertaking; or, further, to display the utility to be derived, or the disadvantage to be apprehended, from particular events, or from the projects of another power. Deductions of a mixed composition are at present most in use.

Order and perspicuity are essential qualities in the drawing up of this description of diplomatic writings. The subject, of which they treat, ought to be set forth in such a manner as to enable the reader, at a glance, to seize their motives, dispositions, propositions, and arguments. A diplomatist should be less solicitous to exhaust the matter (which is rather the object or a dissertation) than to present facts as they really are, together with the remedies to be opposed to an evil, and to reply with precision to objections, which, according to circumstances, may be most to be dreaded, and finally to combat those prejudices which are most contrary to the views or interests of those powers at whose instance these deductions are drawn up.

[1] Martens prefers the term *deductions*, because it is appropriated to this species of diplomatic compositions by ancient diplomatists, as well as by authors of the greatest note. In modern diplomacy, however, this term has become obsolete, and is generally superseded by that of *confidential memoirs*. When diplomatic pieces of this kind are intended only to be communicated to particular cabinets, confidential memoirs frequently have no signatures.

*A SPECIMEN of the CIPHERS referred to in § 18, p. 98. [*125]

Table of the Ciphers.

a	13	122	*n*	35	212	*Angleterre* .	59	247
b	14	124	*o*	37	214	*Monsieur* .	91	249
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k	29	145	*x*	53	241	*de Comminges*	71	275
l	31	147	*y*	55	243	*de* . . .	73	277
m	33	149	*z*	57	245			

Explanatory Remarks.

The Ciphers 6, 8, 23, 45, 320, and 713 are null.

Begin by combining *three* Ciphers.

When the Cipher 424 occurs, begin to read by combining *two* Ciphers.

When the Cipher 49 occurs, begin again by combining *three* Ciphers and so on to the end.

A Despatch Written in Ciphers.

Monsieur,

320147122224135822062142122301357132222346122424
211327473119433872717591635033198333762743194913.
313524913313652493202752596130135147814761352228
234143814742413431935178501961719395027448135065
327354447133515619448171995131525819501935847491
331352201358224623023412281331358224251277147122.
862241352302141472343321432142128262282341431471.
227132208224143230135277424211327431983113926979
944839454319356351983547847375047194431194433194
450431944234450843151939271981763l613.

J' ai l'honneur d'être, etc.

The same Despatch Deciphered.

Monsieur,

La réponse qu' a faite le Roi d'Angleterre au Mémoire de M. de Comminges, et celle qu'il a rendue depuis aux instances de M. Van Goch, achèvent de persuader MM. les Etats de la resolution qu'il a pris de faire la guerre, et ils prennent toutes les mesures sur ce pied là.

J' ai l'honneur d'être, etc.

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[1] This work was subsequently reprinted, with considerable additions, at Paris, in 1832, and again in 1837, in 2 vols. 8vo., entitled, Guide Diplomatique, ou Traite des Droits, des Immunités, et Dévoirs des Ministres Publics.

[2] A new edition of Martens' Précis, with notes by M. S. Pinheiro-Ferreira, was published at Paris, in 1831, in 2 vols. 8vo.

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The pages referred to are those between brackets [ ].